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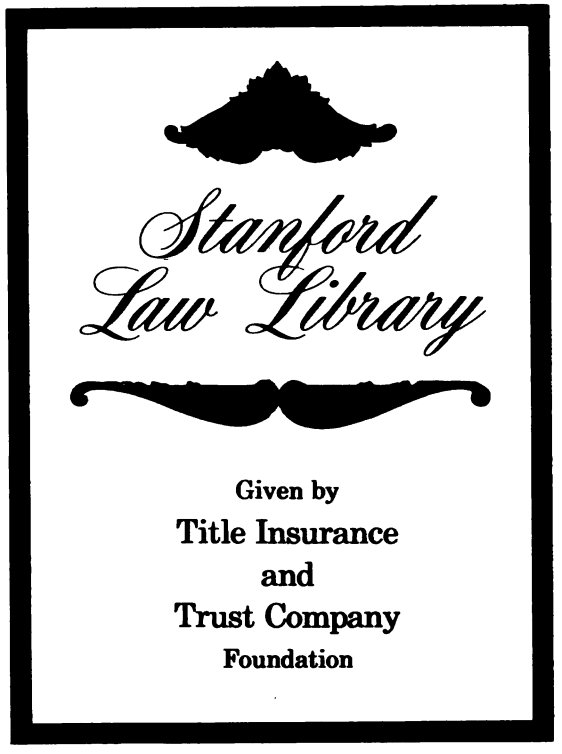
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LAW RELATING TO RECEIVERS.

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T. L. L. 1897

Tagore Law Lectures, 1897.

LAW OF RECEIVERS

THE

LAW RELATING TO RECEIVERS

IN

BRITISH INDIA.

BY

JOHN GEORGE WOODROFFE, M.A., B.C.L.,

Barrister-at-Law, Standing Counsel to the Government of India.

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PREFACE.

THIS second volume contains in an enlarged form that portion of the Tagore Law Lectures delivered by me in the University of Calcutta, which relates to the subject of Receivers, the preceding volume on Injunctions having been published in 1900.

In the preparation of this volume I have consulted and made use of the following English and American text-books :—"A Practical Treatise on the Appointment, Office and Duties of a Receiver under the High Court of Chancery," by W. H. Bennet (London, 1849); "A Treatise on the Law and Practice as to Receivers appointed by the High Court of Justice," by W. W. Kerr, Fourth Edition (London, 1900); "Commentaries on the Law of Receivers," by C. F. Beach (New York, 1894); "A Treatise on the Law of Receivers," by J. L. High, Third Edition (Chicago, 1894); "The Law of Receivers of Corporations," by J. L. Gluck and A. Becker, Second Edition (New York, 1896).

The decisions of the Indian Courts have been collected to date including several unreported cases. I desire to thank Mr. Fink, the Registrar of the High Court, for assistance kindly rendered by him on various points dealt with and for the appendix of forms which he has caused to be prepared for me.

26th September, 1903. J. G. W.

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ADDENDA.

Liberty to Bid. In the suit of *Promothonath Gangooly* v. *Khetter Nath Bannerjee* (Suit 879 of 1900, Cal. H. Ct) an order for reference to the Official Referee was made on the 1st June 1903. The report of the Official Referee was as follows :—

"In this case it was referred to the Registrar and by a subsequent order of transfer of the reference to me to enquire and report whether two matters would be for the benefit of the infant plaintiff in this suit.

1. Whether the receiver should have liberty to bid for and purchase certain properties set out in the schedule to the petition ; and,

2. Whether he should be at liberty to pay a sum of Rs. 206 to one Kamykyanath Bannerjee

From the evidence placed before me it appears that the properties mentioned in the schedule to the petition are properties which were mortgaged to the testator in respect of which suits have been instituted and decrees obtained. In those suits either the receiver is himself the plaintiff or he has been given the conduct of the proceedings.

The first point is whether liberty can be given to a receiver to bid at a sale. Kerr on Receivers says that leave will not be given to a receiver to bid for property the subject-matter of his receivership. In Belchambers' Rules and Orders in the note to Rule 444 (dealing with leave to bid) it is stated that leave will not be given to, amongst others, a receiver, the authority given being Dart's Vendors and Purchasers. I have looked up Dart and Seton on Decrees where the same thing is laid down, and the authority in each instance is the case of *Alven* v. *Bond*, 1 Flannagan and

Kelly, p. 196. That case lays it down that a receiver *without special leave of Court* will not be allowed to bid at a sale of property the subject-matter of his receivership, but it is clear that what is meant is that he in his personal capacity cannot be allowed to buy, the reason of course being the same as in the case of a trustee or an executor that he is in a better position to know the value of the property than outsiders. A trustee is bound to use his knowledge for the benefit of his *cestui que trust*, and as in many cases it might be impossible for the Court to discover the real value of the property, that being only within the trustee's knowledge, it has been laid down that he may not buy. In *Alven* v. *Bond* there was a lead mine on the property of which the receiver was aware and he got some one else to buy in trust as regards one-third for himself and the sale was set aside.

Mr. Belchambers cites an unreported case of *Gunneshur Lall* v. *Khoob Narain* stating that in that case a receiver obtained leave to bid. I have looked up the petition and order in that case and find that the receiver, Mr. Macgregor, Court Receiver and receiver in that suit, only obtained liberty to apply to the Court of the Sub-Judge at Chupra (in whose Court the proceedings were) for leave to bid, the ground being that collusion between the judgment-debtor and purchasers was anticipated.

In the present case the receiver does not desire to bid for or purchase the properties for himself personally, but he desires as receiver of the estate to have this leave in order to prevent the properties being sold at an undervalue. Evidence has been given which shows that in some cases the property has been put up to sale but not sold as the selling officer did not consider a sufficient price had been offered. In other cases it has been shown that the amounts due on the decrees exceed the estimated value of the properties. In other cases where the properties mortgaged are adjacent to a *hât* belonging to the estate it would be for the advantage of the estate to secure the properties and also to the advantage of the mortgagors to keep off bidders so that they might either retain possession as long as possible or buy themselves if the properties were going at a low value. Having regard to the evidence placed before me, I think that it would be for the benefit of the infant and the estate generally if the receiver had liberty to apply in each case to the proper Court for leave to bid, provided that in each case his bid does not exceed the amount due to him for

principal, interest and costs in the suit in which the sale is taking place. This proviso will safeguard the estate inasmuch as it will not be necessary to pay out any extra money.

On the second part of the reference it has been shown that there is due to Kamykya Nath Bannerjee, an old gomastah who was in the service of the testator for many years, a sum of Rs. 164.

By an arrangement with the testator he allowed so much of his salary as he did not need to remain in deposit with the latter, and at the latter's death there was Rs. 164 due. The gomastah did ask the executor for it, but was told he had better let it remain as before to which he consented as he still served the executor. When the receiver was appointed his services were dispensed with, so he demanded payment and unless paid would be driven to a suit. There can be no doubt I think that the money is due to him and to save the costs of litigation the receiver should have liberty to pay the amount I have mentioned."

This report was confirmed by the Court on the 4th June 1903.

Salary—Agreement with Receiver.—A promise to pay the salary of a receiver without leave from the Court, even if unconditional, being in contravention of the law, is not binding on the promisor. A receiver being an officer of the Court, the Court only is to determine his fees or remuneration, and the parties cannot by any act of theirs add to, or derogate from, the functions of the Court without its authority, *Prokash Chandra Sirkar* v. *Adlam*, I. L. R., 30 Cal., 696 (1903).

Leave to proceed against Receiver.—A receiver appointed by the High Court is not the "owner" of the property of which he has been appointed receiver, within the meaning of section 3, cl. (32), of Bengal Act III of 1899; nor can he be made a party to any suit or proceeding without the leave of the Court appointing him. *Fink* v. *Kumar Chundra Kissore*, I. L. R., 30 Cal., 721 (1903).

A receiver appointed by the High Court cannot be made a party to a proceeding under section 145 of the Criminal Procedure Code, merely in his capacity of receiver, and a Magistrate has no jurisdiction to interfere with him in respect of his possession of the estate without the sanction of the Court, his possession being the possession of the Court. *Dunne* v. *Kumar Chundra Kissore*, I. L. R., 30 Cal., 593 (1902).

Receiver of share.—Where one entitled to a share of real estate applied for a receiver of the *entire* joint property—and some of the co-sharers who resisted the appointment were not subject to the jurisdiction—a receiver was granted limited to the share of the applicant and against those only who were subject to the jurisdiction; *Buddinath Paul Chowdhry* v. *Bycauntnath Paul Chowdhry*, 2 Taylor and Bells' R., 192 (1851).

Affidavit.—In making an application on affidavit the latter should contain the facts and not merely follow the words of the Act. "A party cannot swear in the words of an Act of Parliament merely, but must state the facts, without stating what the construction of the Act is," *per* Peel, C. J., in the goods of *Sreemutty Okilmoney Dassee*, Fulton, R. 90 (1842).

Receiver of attached property.—A manager may be appointed by the Court under Act VIII of 1859, section 270, without the consent of the decree-holder. The Court has no power to order that the manager should, out of the proceeds of the estate, satisfy the claims of persons other than decree-holders. *Thakoor Chunder* v. *Chowdry Chotee Singh*, 1 Marshall, R. 261 (1863).

Decree for maintenance : appointment of receiver.—To avoid any difficulty in executing a decree for maintenance out of property charged with payment of the allowance and make a fresh suit unnecessary in case of default in payment of the instalments, a receiver should be appointed under the decree itself with directions, in case of default in payment of the maintenance, to take possession of the estate and sell the same, and out of the sale-proceeds to pay the allowance for maintenance. *Hemanginee Dassee* v. *Kumode Chander Dass*, I. L. R., 26 Cal., 44; S. C., 3 C. W. N., 139.

Partnership suit ; appointment of receiver.—In a suit for an account of a dissolved partnership a decree should be passed under Civil Procedure Code, section 215, in acoordance with form No. 132 in Schedule IV ; and it should direct an account to be taken of the dealings and transactions between the parties and of the credits, property and effects due and belonging to the late partnership, and it should direct the appointment of a receiver of the outstanding debts and effects. *Thirukumaresan Chetty* v. *Subaraya Chetty*, I. L. R., 20 Mad., 13. Observations on the procedure to be adopted and the burden of proof on the taking of the account.

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THE LAW RELATING

TO

RECEIVERS

IN BRITISH INDIA.

CHAPTER I.

GENERAL FEATURES OF THE JURISDICTION.

§ 1. Definition and nature of office of receiver—§ 2. Appointment of a receiver is a form of specific relief—§ 3. Law relating to receivers—§ 4. Jurisdiction to appoint receivers—§ 6. Exercise of jurisdiction is discretionary—§ 6. Enforcement of orders and decrees.

§ 1. A RECEIVER is an indifferent person between the parties to a cause appointed by the Court to receive and preserve the property or fund in litigation *pendente lite* when it does not seem reasonable to the Court that either party should hold it ;[1] or where a party is incompetent to do so as in the case of an infant.[2] A receiver

Definition and nature of the office of Receiver.

[1] High on Receivers, s. 1; Kerr on Receivers, 3; with regard to this definition it must be noted that the Court sometimes appoints (not uncommonly in partnership cases) one of the parties to be receiver.

[2] Kerr, 3. It was formerly considered that in the case of infants the Court had jurisdiction on petition to pronounce an order for a receiver as well as for guardian and maintenance, but it was held by Lord Hardwicke that the Court

is a ministerial officer, originally of the Court of Chancery and as a general rule, a mere custodian having no powers except those conferred by the order of his appointment, though with the growth of equity jurisdiction it has become usual to clothe them with much larger powers than were formerly conferred.[1] A receiver is an officer of the Court through whom equity takes possession of the property which is the subject of a litigation, preserves it from waste and destruction, secures and collects the proceeds and ultimately disposes of them according to the rights and priorities of those entitled thereto whether regular parties in the cause or only coming before the Court in a reasonable time and in the due course of procedure to assert and establish their claims. As the representative of the Court he is subject to its orders, accountable in such manner and to such persons as the Court may direct, and having in his character as receiver no personal interest save that arising out of his fiduciary capacity and responsibility for the correct and faithful discharge of his duties. He is not the representative of a party or parties, but the representative of the Court.[2] A receiver can only be properly granted for the purpose of getting in and securing funds which the Court at the hearing, or in the course of the cause, will have the means of distributing among the persons entitled to those funds.[3]

The receiver appointed in a particular suit is nothing more than the hand of the Court, so to speak, for the purpose of holding the property of the litigants whenever it is necessary that it should be kept in the grasp of the

had not jurisdiction to appoint a receiver unless a cause be depending. *Ex parte Whitfield*, 2 Atk., 315; Bennet on Receivers, 3.

[1] Beach on Receivers, s. 1. He does not represent the estate, but is merely an officer of the Court: *Miller* v. *Ram Ranjan Chakravarti*, I. L. R., 10 Cal., 1014 (1884).

[2] Gluck and Becker, Law of Receivers of Corporations, s. 1.

[3] *Evans* v. *Coventry*, 3 Drew, 80.

Court in order to preserve the subject-matter of the suit *pendente lite*, and the possession of the receiver is simply the possession of the Court. To such an extent is this the case that any attempt to disturb that possession, without the leave of the Court, is a contempt of Court. The receiver has no personal rights in the property, and he cannot take any steps even for the purpose of defending his possession without the sanction of the Court. Also as a rule so little personal interest of any kind has he in the matter that he is not justified himself in making any application whatever to the Court. If it is necessary that he should take action of any sort, it is for the parties to the suit or one of them, to come to the Court to put him in motion; and whatever the receiver rightly does, with regard to the property, he does it simply in the character of agent for the owners of the property or the persons interested in it and with certain exceptions in no sense as principal.[1] Although ordinarily a receiver does not himself apply for commencing proceedings for contempt and although, generally speaking, the action is taken by the parties beneficially interested in the properties there is nothing to prohibit his doing so. Receivers have on occasions taken action themselves without the parties coming forward in the matter.[2] A receiver has no proprietary rights or interest whatever. Notwithstanding his appointment the proprietary rights in the estate remain in the persons who are by law entitled to the estate.[3] The receivers possession is not a possession by any personal right. It is the possession of the Court and he is totally devoid of any interest in the property.[4]

[1] *Wilkinson* v. *Gungadhur Sirkar*, 6 B. L. R., 486 at pp. 487, 488 (1871).

[2] *Grey* v. *Woogra Mohun Thakur*, I. L. R., 28 Cal., 793 (1901).

[3] *Ram Lochun Sircar* v. *Hogg*, 10 W. R., 430, 431 (1868).

[4] *Wilkinson* v. *Gungadhur Sirkar*, 6 B. L. R., 486, 493, 494 (1871).

The general objects sought by the appointment of a receiver may be described to be to provide for the safety of property pending a litigation and until the hearing of the cause,[1] or during the minority of infants; to preserve property in danger of being dissipated or destroyed by those to whose care it is by law entrusted or by persons having immediate but partial interests therein.[2] A receiver duly appointed is from the moment of his appointment to be considered as an officer of the Court itself. He will be protected by it in the proper discharge of the necessary duties of his office; the possession of the receiver not being permitted to be disturbed without the special leave of the Court,[3] and it will be treated as a contempt of the Court if any such interference takes place;[4] the reason being, as explained by Lord Eldon,[5] that their possession is the possession of the Court,[6] and the Court, being competent to examine the title will not permit itself to be made a suitor in a Court of law; but will itself examine the title, the mode being by permitting the party to come in to be examined *pro interesse suo*.[7]

The receiver's functions are to obey the orders of the Court, collect and account for the rents, and manage the

[1] *Tullet* v. *Armstrong*, 1 Keen, 428; *Owen* v. *Homan*, 4 H.L., 1032.

[2] Bennet, 2.

[3] *Brooks* v. *Greathead*, 1 J. & W., 178; *Angel* v. *Smith*, 9 Ves., 335.

[4] *Broad* v. *Wickham*, 4 Sim., 511; *Johnes* v. *Claughton*, Jac., 573; *Doulat Koer* v. *Rameswari Koeri*, I. L. R., 26 Cal., 625, 629 (1899).

[5] *Angel* v. *Smith*, supra: in this case the rule was spoken of as applicable to sequestrators which rule equally applies to receivers.

[6] So where a receiver is appointed to receive rents and profits of immoveable property the tenants in possession become virtually *pro hac vice* tenants of the Court their landlord. *Orr* v. *Muthia Chetti*, I. L. R., 18 Mad., 501, 503 (1893). See also *Doulat Koer* v. *Rameswari Koeri*, I. L. R., 26 Cal., 625, 629 (1899). The Court is not concerned with any claims of, or rights which may have accrued to any third party by reason of any assignment or transfer during the pendency of the suit.

[7] As to the practice with regard to an examination *pro interesse suo*, *see* 1 J. & W., 179.

estate; and the Court will see that this is done and protect the agent appointed under its orders.[1] A receiver may be appointed of any property, moveable or immoveable, the subject of a suit or under attachment.[2] Receivers may also be appointed of the property of insolvents, in which case the appointment is for the benefit of the whole body of creditors;[3] and when a Magistrate attaches, under section 146 of the Criminal Procedure Code, the subject of dispute, he may, if he thinks fit, appoint a receiver thereof, who, subject to the control of the Magistrate, has all the powers of a receiver appointed under the Code of Civil Procedure.[4] The rules relating to such appointments form part of the insolvency and criminal law respectively, and are not dealt with in the following pages which relate to the appointment of receivers in civil actions only. Where a receiver is required for the purpose not only of receiving rents and profits, or of getting in outstanding property, but of carrying on or superintending a trade or business he is usually called a manager or a receiver and manager,[5] though the terms are synonymous.[6] The appointment of a manager implies that he has power to deal with the property over which he is appointed manager and to appropriate the proceeds in a proper manner. He is bound to carry on in accordance with the general course of business adopted by the particular trade, and is the servant and officer of the Court and must upon any question arising as to the character or details

[1] *Dinonauth Sreemonee* v. *Hogg*, 2 Hay, 395, 397 (1863).

[2] Civil Procedure Code, s. 503.

[3] *Ib.*, s. 351; *Badal Singh* v. *Birch*, I. L. R., 15 Cal., 762, 764 (1888). He is entitled to a lien for the amount of his commission on the net assets remaining after payment of the charges specified in s. 356 (*b*), (*c*), (*d*); *Mahadeva* v. *Kuppu Sami*, I. L. R., 15 Mad., 233 (1892).

[4] Criminal Procedure Code, s. 146 (2).

[5] Kerr, 246.

[6] *Orr* v. *Muthia Chetti*, I. L. R., 17 Mad., 501, 504 (1893).

of the management, be directed by the Court which, on appointing a manager of a business or undertaking, in effect, assumes the management into its own hands. Managers are responsible to the Court which appoints them, and no orders of any of the parties interested in the business over which they are appointed managers can interfere with this responsibility. The Court will in no case assume the management of a business or undertaking except with a view to the winding up and sale of the business or undertaking. The management is an *interim* management; its necessity and its justification spring out of the jurisdiction to liquidate and sell; the business or undertaking is managed and continued in order that it may be sold as a going concern and with the sale the management ends. A manager may be appointed to carry on a private trade or business so as to wind it up for the benefit of the parties interested.[1] The Court, if it can appoint a receiver, has ample power to provide for the management of the property and can deal with property which is under its control just as completely as the owner of the property can deal with it.[2] In cases where the manager of the estate must necessarily reside in the country where the estate is situated it is usual in English practice to add to the order directing the appointment of a manager, an order for the appointment of one or more

[1] Kerr, 246: in *Short* v. *Pickering*, I. L. R., 6 Mad., 138 (1882) in which the Court directed a receiver to manage the business of a milliner's shop attached in execution of decrees, it was held that the servant of a firm, the business of which is being managed by a receiver appointed under s. 503 of the Civil Procedure Code, has no preferential claim over the attaching creditor on the assets of the firm for wages due before the appointment of the receiver; in *Orr* v. *Muthia Chetti*, I. L. R., 17 Mad., 501 (1893), a receiver of attached property was appointed to superintend the harvest and to recover the *melvaram*.

[2] *Poreshnath Mukerjee* v. *Omerto Nath Mitter*, I. L. R., 17 Cal., 614, 615 (1890).

consignees (who are the paid agents of the Court to manage the estate which is in the hands of the Court) resident in England to whom the produce of the property in question may be remitted and by whom it may be disposed of.[1]

The possession of the receiver is on behalf and for the benefit of all the parties to the suit in which he is appointed.[2] His possession is the possession of all the parties to the proceeding according to their titles. The property in his hands is *in custodia legis* for the person who can make a title to it. It does not follow that because wide powers are conferred upon receivers including a power to remove the property in possession, his relation either to the Court or to all the parties interested in the proceeding undergoes any change in proportion to the extent of his powers.[3] The appointment, though it may operate to change possession, has no effect itself upon the title to the property in any way and determines no right as between the parties.[4] Although a receiver is an officer to hold property for the benefit of the party ultimately entitled to it, yet when such party is ascertained, the receiver is considered as his receiver.[5] He is not appointed for the benefit of strangers to the suit; but is

[1] Kerr, 253, as to the position and lien of consignees, see *Moran* v. *Mittu Bibee*, I. L. R., 2 Cal., 58 (1876).

[2] *Kartick Nath Pandy* v. *Padmanund Singh*, I. L. R., 11 Cal., 496, 498 (1885); *Orr* v. *Muthia Chetti*, I. L. R., 17 Mad., 501, 503 (1893).

[3] *Orr* v. *Muthia Chetti*, I. L. R., 17 Mad., 501, 503 (1893).

[4] Beach, § 1: *Orr* v. *Muthia Chetti*, 504.

[5] *Orr* v. *Muthia Chetti*, 503. This principle is applicable in the case of a suit in which title to property is decreed and not to attached property, the title to which continues to vest in the judgment-debtor. *See* also *Appasami Naickan* v. *Jotha Naickan*, I. L. R., 22 Mad., 448, 451 (1899); Kerr, 156, 157, but *see* Beach, § 223; High, § 135; the person who has the title to the property must be deemed to be in possession: *Tribhuwan Sundar Kuar* v. *Sri Narain Singh*, I. L. R., 20 All., 341, 344 (1898).

not to be regarded in any sense as the agent or representative of either party to the action,[1] though the ordinary law of principal and agent applies to this extent that what the receiver rightly does, he does in the character of agent for the owner (whoever he be) of the property, and this is so even in the case of parties who opposed his appointment or objected to his receiving particular powers.[2] It was held under the Code of 1859 which contained less extensive provisions than those of the present Code that his duties as officer of the Court are confined in the case of property the subject of attachment to realising, preserving and managing the property for the collection of the moneys and money profits due to the debtor.[3] Where, however, the receiver of attached property acts in the exercise of powers conferred upon him by the Court, it is erroneous to regard him as the judgment-creditor's agent because on his application the appointment is made. The appointment is the act of the Court and once made he is an officer of the Court and subject to its orders.[4] A receiver is frequently spoken of as the "hand of the Court," and the expression very aptly designates his functions as well as the relation which he sustains to the Court. The assets and property in his hands are as much in the custody of the law as if levied

[1] Beach, § 2: he exercises his functions in the interest of neither plaintiff nor defendant, but for the common benefit of all parties in interest; High, § 1; on whose behalf he is appointed. *Prem Lall Mullick* v. *Sumbhoonath Roy*, I. L. R., 22 Cal., 960, 973 (1895).

[2] *Poreshnath Mukerjee* v. *Omerto Nath Mitter*, I. L. R., 17 Cal., 614, 616 (1890); referring to *Wilkinson* v. *Gungadhar Sircar*, 6 B. L. R., 486, as the leading case in this country on the position of a receiver. The appointment ordinarily gives no advantage or priority to the person at whose instance the appointment is made, over other parties in interest. High, § 5.

[3] *Tiel* v. *Abdool Hye*, 19 W. R., 37 (1872), distinguished in *Orr* v. *Muthia Chetti*, I. L. R., 17 Mad., 501, 502, 503 (1893). See *post*, "Receivers of attached property."

[4] *Orr* v. *Muthia Chetti*, I. L. R., 17 Mad., 501, 503 (1893).

upon under an execution or attachment, it being held that the appointment of a receiver is in effect an equitable execution by means of which the Court makes a general appropriation thereof leaving the question of who may finally be entitled to be determined thereafter.[1] When a party is declared entitled to the property by the final decree in a suit, the Court has no option but to give that party possession of it The Court having been in possession of the property on behalf of the parties to the suit is bound to give possession to the successful party in that suit. Anyone else entering into possession would be a trespasser.[2] He has no estate or interest himself, and his power to manage is created simply by the order of the Court appointing him and is binding only upon the persons before the Court.[3] His powers at best are no more than those which the parties to the suit turn out to be possessed of when the case is finally decided; but if he takes possession of property under colour of his appointment, his conduct cannot be disputed by a motion to discharge or get rid of the attachment.[4] As the servant of the Court and not of the parties he has only such power as the Court may choose to give him, and it is a contempt for any of the parties to enter into an agreement with him restricting and controlling his powers.[5]

§ 2. The issue of injunctions, whether temporary or perpetual, is a form of "specific relief." So also is the appointment of a receiver pending a suit.[6] The Code[7]

Appointment of Receiver is a form of specific relief.

[1] High, §§ 2, 5. See *Administrator-General of Bengal* v. *Premlall Mullick*, I. L. R., 22 Cal., 1015, 1016 (1895).

[2] *Doulat Koer* v. *Rameswari Koeri*, I. L. R., 26 Cal., 625, 629, 630 (1899).

[3] *Nilmadhub Mundul* v. *Gillanders*, 2 Sev., 951 (1863).

[4] *Bissessuree Debia* v. *Sookram Doss Mohunt*, 15 W. R., 347 (1871). *Tiel* v. *Abdool Hye*, 19 W. R., 37 (1872) as to the first case v. *post*.

[5] *Manick Lall Seal* v. *Surrut Coomary Dassee*, I. L. R., 22 Cal., 648, 656 (1895).

[6] Act I of 1877, s. 5.

[7] S. 503.

further provides for the appointment of a receiver of property under attachment[1] and also in the case of insolvent debtors.[2] But it has been said that in the former case the appointment of a receiver is "rather a matter of ministerial procedure than of specific relief;" and, in the latter case, the receiver is the agent of the creditors,[3] and both cases must be distinguished from a receiver appointed by way of specific relief pending a suit.[4] Relief by specific performance, injunction and receiver belong to the same branch of the law. Moreover, the appointment of a receiver operates as an injunction against the parties, their agents and persons claiming under them, restraining them from interfering with the possession of the receiver except by permission of the Court;[5] and "an order for an injunction is always more or less included in an order for a receiver. It is not necessary, if a receiver be appointed, to go on and grant an injunction in terms."[6] All three forms of relief are dealt with by the Specific Relief Act. The issue of temporary injunctions and the appointment of receivers are, together with the subjects of arrest and attachment before judgment and interlocutory orders, dealt with by the Code under the single heading of "Provisional Remedies."[7] Relief granted by appointment of a receiver *pendente lite* bears in many respects a close analogy to that by temporary injunction. Both are extraordinary equitable remedies as distinguished from the ordinary modes of administering relief. Both are essentially preventive in their nature,

[1] *See* Form 168 in the Fourth Schedule of the Code.

[2] Chapter XX.

[3] See *Ex parte Warren. In re Joyce*, L. R., 10 Ch. Ap., 222. In the matter of *Badal Singh* v. *Birch*, I. L. R., 15 Cal., 762, 764 (1888).

[4] Collett's Law of Specific Relief in India (1882), p. 236.

[5] *Mahomed Zohuruddeen* v. *Mahomed Nooroddeen*, I. L. R., 21 Cal., 85, 91 (1893).

[6] Kerr, 10.

[7] Civ. Pr. Code, Part IV.

being properly used only for the prevention of future injury, rather than for the redress of past grievances. Both have one common object in so far as they seek to preserve the *res* or subject-matter of the litigation unimpaired, to be disposed of in accordance with the future decree or order of the Court.[1] There is, however, a distinction between the remedies in that "specific performance is directed to compelling performance of an active duty, while injunction (though sometimes in a subsidiary way requiring an act to be done) is generally directed to preventing the violation of a negative one. This difference, however, is very great. The remedy of specific performance, relating as it does to active duties, deals in the main only with contracts;[2] while the remedy of injunction, having to do with negative duties, deals not only with contracts, but also with torts, and with many other subjects, among them subjects of a purely equitable nature."[3]

Whether, however, the negative duty, or duty to abstain, be contractual or general, the injunction which enforces it is the same in nature and form. The general grounds of similarity between relief by receiver and by injunction have been adverted to. Perhaps the principal element of difference between these two important remedies lies in this: that an injunction is strictly a conservative remedy, merely restraining action and preserving matters *in statu quo*, without affecting the possession of the property or fund in controversy; while the appointment of a receiver is usually a more active remedy, since it changes the possession as well as the subsequent control and management of the property. The Court by an

[1] High, Receivers, 16, 17.

[2] Smith's Principles of Equity, 688.

[3] *Ib.*; Story, Eq. Jur., 13th Amer. Ed. (1886), p. 179. Note by M. M. Bigelow.

injunction ties up the hands of the defendants and preserves unchanged, not only the property itself, but the relations of all parties thereto. But in appointing a receiver the Court goes still farther, since it wrests the possession from the defendant and assumes and maintains the entire management of the property or fund, frequently changing its form, and retaining possession through its officer, the receiver, until the rights of all parties in interest are satisfactorily determined.

From the points of resemblance already indicated it is not to be inferred that the appointment of a receiver necessarily follows from the granting of an injunction or that the two remedies are necessarily inseparable. And while it frequently happens that the Courts are called upon to administer both species of relief in the same action, and at one and the same time, yet it by no means follows that because an injunction is granted a receiver must be appointed and the two are to be treated as distinct and independent matters. The Court therefore may refuse a receiver, although the case presented is a fitting one for an injunction and although an injunction has already been granted.[1] A distinction exists between the case in which an injunction and that in which a receiver will be issued or appointed respectively. "That distinction seems to be that, while in either case it must be shown that the property should be preserved from waste or alienation; in the former case it would be sufficient, if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged; while in the latter case, a good *primâ facie* title has to be made out."[2]

[1] High, 17, 18, and see *Hall* v. *Hall*, 3 MacG., 85, where it was said that "the rights to those different remedies are essentially distinct and depend upon totally different grounds and circumstances."

[2] *Chandidat Jha* v. *Padmanand Singh Bahadur*, I. L. R., 22 Cal., 459, 465 (1895), *per* Ghose and Rampini, JJ.

Relief whether it be given by the issue of an injunction or the appointment of a receiver is granted generally upon the principle *quia timet*; that is, the Court assists the party who seeks its aid, because he fears (*quia timet*) some future probable injury to his rights or interests, and not because an injury has already occurred, which requires any compensation or other relief. So the remedy by temporary injunction being preventive in its nature, it is not necessary that a wrong should have been actually committed before the Court will interfere, since, if this were required, it would in most cases defeat the very purpose for which the relief is sought by allowing the commission of the act which the complainant seeks to restrain. And satisfactory proof that the defendants threaten the commission of a wrong (which is within their power) is sufficient ground to justify the relief.[1] These and other similar precautionary reliefs were formerly granted by Courts of Equity on Bills *quia timet*,[2] to support which it must have been shown, firstly, that there was a title in possession or expectancy in the plaintiff, and, secondly, that there was danger to the property.[3] These bills would now take the form of an action in the nature of a Bill *quia timet*, and would be brought, in England, in the Chancery Division, and in India,[4] in any Court of Jurisdiction competent to grant the relief prayed. "The remedy of (final) injunction, like that of specific performance, proceeds upon the theory that there are duties, the performance of which, as they stand, ought to be insisted upon,—duties in regard to which an election, as an equivalent, to violate the same upon the terms of making

[1] Story, Eq. Jur., § 826: High. Inj., 17—23.

[2] Story, Eq. Jur., §§ 825—851.

[3] *Satoor* v. *Satoor*, 2 Mad. H. C. R., 8, 10 (1864).

[4] *Ib.*, 10, where it was pointed out that the plaint was really in the nature of a Bill *quia timet*, but that it did not disclose any of the grounds necessary to support such a bill.

compensation cannot be permitted ; not indeed that all the duties, the violation of which may be enjoined, may be enjoined without regard to the question whether damages for a violation could be accurately computed, but that there *are* duties of a peremptory nature within the operation of the remedy of injunction as well as within that of specific performance. These duties may here, as well as in the law of specific performance, be termed primary, since they are not substitutional.[1] The manner in which the above-mentioned aid is given by Courts of Equity is, of course, dependent on circumstances. They interfere sometimes by the mere issuing of an injunction or other remedial process.[2] But that portion of equitable jurisdiction which consists in the administration of a protective or preventive justice is not limited to this. The Courts interfere also by orders to pay funds into Court,[3] by directions to give security, by orders for the detention and preservation of property, by other like orders and directions,[4] and by the appointment of a receiver to receive rents or other income,[5] thus adapting their relief to the precise nature of the particular case and the remedial justice required by it ; the object being in all cases to preserve property to its appropriate uses and ends.[6]

Law relating to Receivers.

§ 3. The law relating to the appointment of receivers in civil suits[7] in British India[8] is contained in the Civil

[1] Story, Eq. Jur., 13th Amer. Ed., 1886, pp. 178, 179. Note by M. M. Bigelow.

[2] v. *Supra.*

[3] See *Satoor* v. *Satoor*, 2 Mad. H. C. R., 8, 11 (1864).

[4] *See* Author's Law of Injunctions, p. 20.

[5] Civ. Pr. Code, §§ 503—505 : Act I of 1877, s. 44.

[6] Story, Eq. Jur., § 826 ; Smith's Principles of Equity, 752.

[7] The Criminal Procedure Code in ss. 88, 146 (2), deals with the appointment of receivers of attached property. Specific relief by the appointment of a receiver cannot be granted for the mere purpose of enforcing a penal law. Act I of 1877, s. 7.

[8] For definition of these words, *see* Act I of 1868, s. 2 (8), as amended by Act XII of 1891.

Procedure Code[1] and Specific Relief Act[2] which merely declares that the appointment of a receiver pending a suit rests in the discretion of the Court and refers to the Code of Civil Procedure for the mode and effect of their appointment, and for their rights, powers, duties and liabilities. Both the earlier Codes (Acts VIII of 1859 and X of 1877) dealt with the subject.[3]

Act X of 1877, however, contained provisions of a more complete character, and which were in fact with some minor alterations in the sections relating to receivers, the same as those of the present Code. Section 92 of Act VIII of 1859 enabled the Court to appoint a receiver or manager in all cases in which it might appear to the Court to be necessary for the preservation or the better management or custody of any property "which is in dispute in a suit," and section 243 enabled the Court to appoint a manager to realize debts or rents and receipts of landed property where the debts or land were attached in execution of decrees. Chapter XXXVI of the Code of 1877 which, with some minor alterations,[4] is identical

[1] Ss. 503—505. As to the appointment of receivers in insolvency under Ch. XX and under s. 503 of property under attachment v. *post*. Ss. 1—3 of the Code extend to the whole of British India; the other sections to the whole of British India except the Scheduled Districts as defined in Act XIV of 1874. The Code has been extended to certain of these districts. *See* the Author's Law of Injunctions, p. 2, note (3).

[2] Act I of 1877, s. 44, which extends to the whole of British India except the Scheduled Districts to some of which, however, it has been extended. *See* Author's Law of Injunctions, p. 3, note (1).

[3] *See* Act VIII of 1859, ss. 92, 94, 243, Act X of 1877, ss. 503—505.

[4] In s. 503, cl. (d) the words "*as the Court thinks fit*" were inserted after the word "remuneration" by Act VII of 1888, s. 42. In s. 504, Act X of 1877, the opening words of the section were "*if the property be*" instead of "*where the property is.*" In the same section Act VII of 1888, s. 43, has substituted the words "*the Court may with the consent of the Collector appoint him*" for the words "*the Court may appoint the Collector*" in Act X of 1877, so as to render the Collector's consent necessary to his appointment as receiver.

with the same chapter of the present Code supplied the place of both of these provisions, and going further gave the Court very general powers as to the appointment of receivers.[1]

Further orders made under section 92 of Act VIII of 1859 were appealable only at the instance of the defendant,[2] but orders made under section 503 of the preceding[3] or present[4] Code are appealable at the instances of either party. Prior to the establishment of the High Courts the Supreme Courts of the Presidencies appointed receivers following the principles and practice of the Court of Chancery in England.[5]

Jurisdiction to appoint Receivers.

§ 4. The jurisdiction of the Civil Courts in this country to grant relief by injunction or receiver is determined by the Civil Procedure Code and Specific Relief Act. Certain common conditions are necessary to the existence of jurisdiction to grant either of these forms of specific relief which conditions will be found fully dealt with in

[1] Ss. 503–505 of Act X of 1877 are, except as to the points mentioned in the last note, identical with the same sections of the present Code. As to s. 504, *see* Act XIII of 1859, s. 92. S. 505 was first inserted in the Code by Act X of 1877. A Mofussil Court of Small Causes could not appoint a receiver under the Code of 1877 as Ch. XXXVI was not extended to those Courts, but it is otherwise under the present Code. *Nursingdas* v. *Tulsiram*, I. L. R., 2 Bom., 558 (1878).

[2] Act VIII of 1859, s. 94.

[3] Act X of 1877, s. 588 (*e*).

[4] Act XIV of 1882, s. 588 (24).

[5] See *Kistonundo Biswas* v. *Prawnkissen Biswas* (1829), Clark's Rules and Orders, 1829. Notes of decided cases, 52. In the Charter establishing the Supreme Court of Judicature, 26th March 1774, cl. 18, given in Vol. I of Smoult and Ryan's Rules and Orders, it is ordained that the Supreme Court be a Court of Equity with full power and authority to administer justice as nearly as may be according to the rules and proceedings of the Court of Chancery. As to the High Courts, *see* High Courts Act, 1861, cls. 9—11, and Letters Patent, s. 19. As to the former powers of District Courts to appoint receivers, see *John Tiel* v. *Abdul Hye*, 19 W. R., 37, 39 (1872); *Joynarain Geeree* v. *Shibpersad Geeree*, 6 W. R., Misc., 1 (1866); (jurisdiction of Sudder Ameen). As to Mofussil Small Cause Courts v. *ante*.

the Author's Law of Injunctions, pp. 40—63. More shortly stated these conditions are as follows :—

(1) In the first place, specific relief whether given by the issue of an injunction or the appointment of a receiver cannot be granted for the mere purpose of enforcing a penal law,[1] that is, such enforcement must not be the *sole* object of requiring specific relief, but the real object must be the protection of some civil right or the prevention of a tort or civil wrong. Though, however, the Court cannot interfere for the purpose of giving a better remedy in the case of a criminal offence yet if an act which is criminal touches also the enjoyment of property the Court has jurisdiction.[2] So the fact that an act complained amounts to the criminal offence of misappropriation rather than to simple waste is no ground for refusing relief by way of appointment of a receiver.[3]

(2) Secondly, assuming the matter to be of a civil nature it is ordinarily a necessary condition to the grant of either form of relief that there should be a suit pending in which either of these reliefs may be granted.[4] Under the Code, however, a receiver may be appointed not merely of property the "*subject of a suit*," but also of property "*under attachment*." The suit must be pending in the Court from which either of these reliefs is sought. Thus a District Court has no jurisdiction to appoint a receiver or manager in respect of property in dispute in a suit pending in a subordinate Court[5]; and where a Court has thus no jurisdiction to make an order it can have no juris-

[1] Act I of 1877, s. 7.

[2] *See* Author's Injunctions, 40, 41.

[3] *Hanumayya* v. *Venkatasubbayya*, I. L. R., 18 Mad., 23 (1894).

[4] A Court has not jurisdiction to appoint a receiver unless a cause be depending. *Ex parte Whitfield*, Bennet 3, Author's Law of Injunctions, pp. 41, 42.

[5] *Dhundiram Santukram* v. *Chanda Nabai*, 2 Bom. H. C. R., 103, 2nd Ed., 98 (1865). *Lataful Hossein* v. *Anunt Chowdhry*, I. L. R., 23 Cal., 517 (1896).

diction to modify such order.[1] Section 503 of the Code gives power only to the Court in which the suit is brought or by which the property has been attached. A Court cannot appoint a receiver except it has seisin of the property either by a suit being pending or by proceedings in execution of decree made in a suit being pending and attachment having been made. It is only the Court in which a proceeding is pending and which has thereby the property under its control that can appoint a receiver. It is only where the procedure contained in section 505 has been adopted that a District Court can appoint a receiver in suits pending before or attachments made by subordinate Courts.[2]

(3) Thirdly, not only must the matter be of a civil, as opposed to a criminal nature, and subject to what is above stated, a suit be pending, but such suit must disclose a cause of action, and the Court must have general jurisdiction to entertain it. If it has not such jurisdiction it will plainly have no power to grant relief. The Court must not be barred by the Code or any other enactment from taking cognisance of the suit which must further be not only of a civil nature generally, but within the meaning of that Code.[3]

(4) Lastly, the Court to which application for the relief prayed for is made, must be one which, assuming all the preceding conditions to have been fulfilled, has otherwise jurisdiction to try the suit in which that relief is sought. With regard to this the extensive power of the Court of Chancery to act *in personam* must be considered with reference to the limitation on jurisdiction imposed by the Charters and by the Code of Civil Procedure. The Courts of this country have ordinarily no jurisdiction to

[1] *Dhundiram* v. *Chanda*, supra.

[2] *Latafut Hossein* v. *Anunt Chowdhry*, I. L. R., 23 Cal., 517, 519, 520 (1896).

[3] *See* Author's Law of Injunctions, pp. 42—44.

try suits for immoveable property where such property is situate without the local limits of their jurisdiction, and it would appear to be doubtful whether the equitable jurisdiction of the High Courts in India is of the same extent as that which has been claimed by the Court of Chancery, namely, to take cognisance of any equity between persons residing within the jurisdiction respecting lands outside it. But whatever may be the precise extent of the jurisdiction, the Civil Procedure Code has given to the Mofussil Courts the power to act *in personam* when the person against whom relief is sought resides within the jurisdiction. The Presidency High Courts under their Charters have a similar but in terms less restrictive jurisdiction.[1]

In the case of receivers it is not necessary in all cases in order to authorize the Court to make an appointment that the property in respect of which the receiver is to be appointed should be within the local limits of its jurisdiction.[2] In England it is not necessary in order to authorize the Court to appoint a receiver that the property in respect of which he is to be appointed should be in England or indeed in any of His Majesty's dominions. It is well settled that the Court can appoint receivers over property out of the jurisdiction, the power being based upon the doctrine that the Court acts *in personam*. Thus receivers have been appointed of property situate in Ireland, India, Canada, China, Australia. But the Court will not make the order if it would be useless, and a man will not be appointed receiver unless he be within reach of the Court or has submitted himself to its jurisdiction. In such cases a receiver is appointed in

[1] *See* the subject fully discussed and cases cited in the Author's Law of Injunctions, pp. 44—54.

[2] *Juggodumba Dossee* v. *Puddomoney Dossee*, 15 B. L. R., 318, 324, 325, 330 (1875).

England with power to appoint an agent abroad to collect the estate and remit the same to the receiver in England.[1] So in this country in a suit[2] brought by some of the persons appointed trustees under a deed of endowment of certain land against their co-trustees, who were in possession, the plaint alleged that the defendant trustees had ousted the plaintiffs and had committed breaches of trust and prayed that the deed might be construed and given effect to and for a declaration that the plaintiffs were entitled to be *sebaits* jointly with the defendants, for the settlement of a scheme for the performance of the worship, for the appointment of a receiver, for an injunction to restrain the defendants from interfering with the property and for an account. By the deed the land was given to idols named therein, and the plaintiffs and defendants were appointed, subject to certain directions, *sebaits* and managers of the property, but were themselves to have no beneficial interest in the property.[3] The land the subject of the deed, was situated out of Calcutta, but all the parties to the suit resided within the local limits of the High Court's jurisdiction;[4] it was *held* that, as the parties had no personal beneficial interest in the settled property the suit was not one "for land" within the terms of the Charter, and that the Court had accordingly jurisdiction to entertain it, and to appoint, if necessary, a

[1] Kerr, 112, 13. *In re Maudslay, Sons and Field*, 1 Ch. (1900), 602, 611.

[2] *Juggodumba Dossee* v. *Puddomoney Dossee*, supra.

[3] See *The Delhi and London Bank* v. *Wardie*, I. L. R., 1 Cal., 261 (1876), *per* Pontifex, J.

[4] Where some of the parties opposing the appointment of a receiver were not subject to the jurisdiction, the Supreme Court stated that it "would always be careful for that reason to limit the appointment to the portion of the estate in the possession of those subject to the jurisdiction and before the Court." *Buddinath Paul Chowdhry* v. *Bycantnath Paul Chowdhry*, 2 Tay. & Bel. 192 (1851).

receiver of such property.[1] In respect of the objection that the Court had no power to appoint a receiver, it was said "it has been the practice of the Court were it necessary to do so in order to enforce its own decree to appoint a receiver in respect of landed property situate in the Mofussil, and we feel ourselves justified in following that practice."[2] But in an earlier case where the whole cause of action did not arise in Calcutta, and only one defendant was personally subject to the jurisdiction and the immoveable property was in Bombay, the Court was not prepared to say that it could appoint a receiver for the property which was within the jurisdiction of the Bombay Court, but was of opinion that whether it might or might not appoint a receiver of the property in Bombay it would certainly be a most inconvenient course to adopt.[3] In the undermentioned suits the Court held that it had power to appoint a receiver of properties outside the jurisdiction which had been partitioned by the Court in the suits in which the application for the appointment of a receiver was made.[4]

But in this country the power to make orders *in personam*, though the subject-matter of the suit is without the jurisdiction, must be considered with reference to the limitation on jurisdiction imposed in the case of the High Courts by their respective Letters Patent[5] and in the case of Mofussil Courts by the Civil Procedure Code.[6] So

[1] *Juggodumba Dossee* v. *Puddomoney Dossee*, 15 B. L. R., 318, 324, 325, 330 (1875). (*See* remarks on this case in *Jairam Narayan Raje* v. *Atmaram Narayan Raje*, I. L. R., 4 Bom., 482, 484, 485 (1880).

[2] *Ib.*

[3] *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub*, 13 B. L. R., 91, 99 (1874).

[4] *Poresh Nath Mookerjee* v. *Radha Nath Mookerjee* and *Kamal Kumaree Debi* v. *Poresh Nath Mookerjee*, Cal. H. C. Suits 567 of 1874 and 307 of 1875. *Cor* Sale, J., 13th July 1899, *see* this case cited in Chapter II, *post*.

[5] Letters Patent, 1865 (Calcutta), cl. 12.

[6] Civ. Pr. Code, ss. 16, 16A. *See* Author's Law of Injunctions, pp. 51—54.

where there is no jurisdiction to entertain a suit on the ground that it is one for immoveable property situated without the local limits of the jurisdiction, the Court will have no power to grant provisional relief by way of the appointment of a receiver to take charge of the subject-matter of dispute in such suit.[1] Thus where a suit was brought which, amongst other reliefs, prayed that a receiver might be appointed to carry out certain trusts, it was *held* that though the plaint disclosed a good cause of action, as the Court, if it had jurisdiction, would have power to grant certain forms of relief prayed, including the appointment of a receiver of the estate, yet inasmuch as the suit was in substance one "for land" within the meaning of the Charter, the Court had no jurisdiction to try it. And accordingly all relief and of necessity, also, such appointment, was refused.[2] Even when land which was situate out of the local limits of the jurisdiction of the High Court, was already in the possession of a receiver appointed by the late Supreme Court[3] it was *held* that the High Court could not exercise jurisdiction in respect to such land in a suit which was held to be one "for land" within clause 12 of the Letters Patent.[4] The test, therefore, of jurisdiction in all such cases is rather the nature of the claim made in respect of the property in suit than the actual situation of such property. If the suit is not by reason of its substantial character and the provisions of the Code or Charters within the cognisance of the Court the latter is unable to grant relief. But where the relief sought is

[1] *The Delhi and London Bank* v. *Wordie*, I. L. R., 1 Cal., 249, 257 (1876), explained in *Kellie* v. *Fraser*, I. L. R., 2 Cal., 453, 457, 463, 465 (1877).

[2] *Ib.*

[3] The jurisdiction of the Supreme Court was not limited in the manner that the jurisdiction of the High Courts is limited. It had the power of dealing with land out of Calcutta. *See* Author's Law of Injunctions, p. 53 n (3) and cases there cited.

[4] *Denonath Sreemoney* v. *Hogg*, 1 Hyde, 141 (1862-1863).

purely *in personam* and not *in rem* the Courts are empowered to make a decree which shall be of the same character.

The Presidency High Courts possess the same powers with regard to the appointment of a receiver as are possessed and exercised by the Courts in England under the Judicature Act of 1873, and the practice in respect of these matters should be the same.[1] But while all Civil Courts, with certain exceptions have jurisdiction to issue injunctions, on the other hand, the powers conferred by the Civil Procedure Code in respect of the appointment of receivers can be exercised by the High Courts and District Courts only : provided that whenever the Judge of a Court subordinate to a District Court[2] considers it expedient that a receiver should be appointed in any suit before him, he shall nominate such person as he considers fit for such appointment and submit such person's name, with the grounds for the nomination to the District Court, and the District Court shall authorize such Judge to appoint the person so nominated, or pass such other order as it thinks fit.[3]

The first step taken by the Subordinate Judge is to nominate and from this proceeding, there is no appeal ; the Judge then approves and under section 505 authorises

[1] *Jaikisondas Gangadas* v. *Zenabai*, I. L. R., 14 Bom., 431, 434 (1890).

[2] As to the meaning of "District Court," *see* s. 2, Civ. Pr. Code.

[3] Civ. Pr. Code, s. 505. Section 503 of the Code extends to the Presidency Small Cause Courts (Act XV of 1882, s. 23, Sched. II ; but *see* also the terms of s. 23) ; and ss. 503-505 of the Code apply to Provincial Courts of Small Causes (Act IX of 1887, s. 17 ; Civ. Pr. Code, Sched. II ; but *see* also the terms of s. 17, Act IX of 1887). It was otherwise under the Code of 1877. See *Nursingdas Raghunathdas* v. *Tulsiram bin Doulatram*, I. L. R., 2 Bom., 558 (1878). The Code is applicable to suits under the Bengal Tenancy Act (VIII of 1885), v. *ib.*, ss. 143, 148, and as to the appointment of receivers in such suits, see *Kartic Nath Pandy* v. *Padmanund Singh*, I. L. R., 11 Cal., 496 1885).

the appointment and from this also there is no appeal: then the Subordinate Judge appoints the receiver previously nominated and from this order there is an appeal.[1]

The Judge of the Lower Subordinate Court has first to satisfy himself that it is expedient that a receiver should be appointed in a suit before him; for this purpose he must enquire judicially and satisfy himself upon evidence that the appointment of a receiver is necessary and recommend a proper person. He does this under section 503. If he refuses to do it, his order refusing the application is an order under section 503, and as such is appealable.[2] In the first of the last mentioned cases it was held that an order by a Subordinate Judge dismissing an application for the appointment of a receiver after obtaining sanction from the District Judge is appealable. But it has been recently held that a Subordinate Judge when considering the expediency of the appointment of a receiver is also acting under section 503, and whether he appoints or whether he refuses to take the necessary steps preliminary to appointment he is equally acting under section 503, and an appeal lies.[3] After such enquiry he is to nominate such person as he considers fit to be nominated, and submit such person's name, with the grounds for the nomination, to the District Court; then if the District Court shall authorize such Judge to appoint the person so nominated, but not otherwise, he is to appoint him. But the Judge of the District Court may decline to authorize the Judge of the Lower Court to make the appointment of the person so nominated, and may himself pass "such other

[1] *Sangappa* v. *Shivbasawa*, I. L. R., 24 Bom., 38, 41 (1899).

[2] *Gossain Dulmir Puri* v. *Tekait Hetnarain*, 6 C. L. R., 467, 468 (1880) *Venkatasami* v. *Stridavamma*, I. L. R., 10 Mad., 179 (1886); *Boidya Nath Adya* v. *Makhan Lall Adya*, I. L. R., 17 Cal., 680 (1890).

[3] *Sangappa* v. *Shivbasawa*, I. L. R., 24 Bom., 38 (1899).

order as he thinks fit."[1] These words give the Judge of the District Court full control over the matter of the appointment of a receiver. His duty is not only to approve or disapprove of the particular person nominated, but also to take into consideration the necessity for the appointment of a receiver at all.[2] These words give full discretion to the District Judge to pass such order as the circumstances of the case considered in all their bearings require. He may give the proper directions to the Subordinate Court. Nomination in section 505 seems to be equivalent to the conditional appointment of a receiver which the District Court can accept or reject or modify.[3] In the latter case the District Judge made an *ex parte* order for the appointment of a receiver under section 505. Subsequently the District Court made an order admitting a review. The plaintiff appealed to the High Court. Without deciding whether an appeal would lie against the order of the District Judge, the High Court dismissed the appeal holding that the order of the District Judge having been in the first instance, *ex parte*, he had clearly the power to review it.[4] But these words must be read as controlled by the words preceding them, and do not confer upon the District Court the power itself to appoint a receiver not nominated by the Subordinate Court.[5] The Judge of the Lower Court, in making his enquiry under section 503, has all the powers conferred upon him that may be necessary for such enquiry. He may adjourn the case from time to

[1] *Gossain Dulmir Puri* v. *Tekait Hetnarain*, supra, 468. The Subordinate Judge may nominate but he cannot go further and appoint a receiver: *Latafut Hossein* v. *Anunt Chowdhry*, I. L. R., 23 Cal., 517, 519, 520 (1896).

[2] *Birajan Kooer* v. *Ram Churn Lall Mahata*, I. L. R., 7 Cal., 719, 721 (1881). [*See* appeal against order 115 of 1885 cited in note to I. L. R., 10 Mad., 180, 181] followed by case in next note.

[3] *Chunilal* v. *Sonabai*, I. L. R., 21 Bom., 328 (1895).

[4] *Ib.*

[5] *Amar Nath* v. *Raj Nath*, I. L. R., 18 All., 453 (1896).

time, and he may hear fresh evidence at any time before he makes the appointment. He may even abstain from appointing, when he has received the necessary authority, if he has good grounds for so doing, otherwise he might be appointing an unfit person when he has facts before him to show that the appointment would be most improper. Section 505 is not imperative. It merely enables the Judge of the Lower Court to appoint when authorized by the District Court to do so.[1] The jurisdiction to appoint a receiver may be exercised either by a Court of first instance or by a Court of Appeal.[2] In order to give the Court jurisdiction there must be a pending suit ;[3] and the Court cannot, in so far as it's power to appoint a receiver extends only to the better management or custody of any property which is the subject of a suit, appoint, or continue the previous appointment of a receiver when the suit comes to an end by its dismissal ;[4] but when a suit is decreed, there is nothing in the Code of Civil Procedure which limits the power of the Court to appoint a receiver after the decree, when this course is necessary or proper. So where in a suit by the widow of a deceased partner to wind up the partnership, on the application of the plaintiff after decree a receiver was appointed to collect outstanding debts for the purpose of executing the decree, it was objected that section 503 referred only to the appointment of a receiver during the pendency of a suit, it was held that the appointment of a receiver after decree was valid.[5] As long as the order appointing a receiver remains unreversed, and as long as the suit

[1] *Gossain Dulmir Puri* v. *Tekait Hetnarain*, supra, 469.

[2] *Jaikissondas Gangadas* v. *Zenabibai*, I. L. R., 14 Bom., 431 (1890). *See* also *Shaik Moheeoodeen* v. *Shaikh Ahmed Hossein*, 14 W. R., 384, 385 (1870).

[3] v. *ante*.

[4] *Shaik Moheeoodeen* v. *Shaik Ahmed Hossein*, supra.

[5] *Shunmugam* v. *Moidin*, I. L. R., 8 Mad., 229, 233 (1884), Kerr., 131.

remains a *lis pendens*, the functions of the receiver continue, until he is discharged by order of the Court.[1] Although the dismissal of a suit may operate as a discharge of the receiver appointed in it,[2] yet the Court has ample jurisdiction, without the aid of a pending process, to require accounts from its own officer, to permit parties interested to intervene in the examination of these accounts, to make just allowances to its officer for his administration, and to deal with all questions of costs connected with the investigation of his accounts as between him and any parties interested, who may be allowed to appear and take part in it.[3]

The Court, if it can appoint a receiver, has ample powers to provide for the management of the property; and can deal with property which is under its control just as completely as the owner of the property can deal with it.[4] The subject-matter of the appointment must be property moveable or immoveable, which is "the subject of a suit,"[5] or "under attachment," which latter words apply to property for the first time attached in execution of any decree.[6] Where the property to be managed is not the subject of the suit no manager can be appointed before attachment.[7] Where, owing to the value of the subject-

[1] *Dinonath Sreemonee* v. *C. S. Hogg*, 2 Hay., 395, 396 (1863).

[2] *Prem Lall Mullick* v. *Sumbhoonath Roy*, I. L. R., 22 Cal., 960, 973 (1895).

[3] *Administrator-General of Bengal* v. *Prem Lall Mullick*, I. L. R., 22 Cal., 1011, 1015, 1016 (1895).

[4] *Poreshnath Mookerjee* v. *Omirto Nath Mitter*, I. L. R., 17 Cal., 614, 615 (1890).

[5] Civ. Pr. Code, s. 503. See *Sundaram* v. *Sankara*, I. L. R., 9 Mad., 334 (1886); *Jaynarain Geeree* v. *Shibpersad Geeree*, 6 W. R., Misc. 1 (1866); *Kartic Nath Pandy* v. *Padmanund Singh*, I. L. R., 11 Cal., 496 (1885); *Yeshwant Bhagwant Phatarpakar* v. *Shankar Ramchandra Phatarpakar*, I. L. R., 17 Bom., 388 (1892); *Poreshnath Mookerjee* v. *Omirto Nath Mitter*, I. L. R., 17 Cal., 614 (1890).

[6] *See* Form No. 168 in the fourth Schedule of the Code.

[7] *Bunwaree Lall Sahoo* v. *Baboo Girdharee Singh*, 16 W. R., 273 (1871).

matter of a suit, the Court has no power to try the same, any order made therein by way of appointment of a receiver is passed without jurisdiction.[1] The fact that the acts complained of, and which form the ground of an application for a receiver, amount to a criminal offence rather than to a civil wrong, will not deprive the Court of jurisdiction, if such acts affect a right to property.[2] Thus in a suit for the partition of the estate of a trading joint-family, which estate belonged to the plaintiff and his brother, the eldest surviving member of the family, it appeared that the latter had for some time past misappropriated large sums of money and had thrown the accounts into confusion. The plaintiff, therefore, applied to have a receiver appointed of the estate. The District Judge dismissed the petition on the ground that no case had been established under section 503 of the Civil Procedure Code; that the acts complained of amounted to misappropriation rather than waste; and that the petitioners could thereafter institute a criminal prosecution. It was *held* on appeal that these were clearly not sufficient reasons. The Code authorized the appointment of a receiver for the preservation or better custody of property, the subject of a suit. Whether property was wasted or misappropriated made no difference for the purposes of the Code. And it was pointed out that the future institution of a criminal prosecution would not enable a party to recover property that may have been misappropriated. The order of the District Judge was, therefore, set aside, and the case remanded for disposal according to law.[3] The fact that there exists in respect of any immoveable property an order of a Magistrate

[1] *Boidya Nath Adya* v. *Makhan Lal Adya*, I. L. R., 17 Cal., 680 (1890).

[2] *Hanumayya* v. *Venkatasubbayya*, I. L. R., 18 Mad., 23 (1894).

[3] *Ibid.*

passed under section 145 of the Code of Criminal Procedure is no bar to the exercise by a Civil Court of the power conferred on it by section 505 of the Civil Procedure Code of appointing a receiver in respect of the same property. The Magistrate's order under section 145 is only intended to control any period up to the time when the Civil Court takes seisin of the matter and passes such orders as may be necessary for the protection of the property.[1] As to the power to appoint receivers in cases under the Rent Act, v. *ante*, p. 23.

As has been already stated,[2] the powers conferred by the Civil Procedure Code in respect of the appointment of a receiver can be exercised by High Courts and District Courts only provided that whenever the Judge of a Court subordinate to a District Court considers it expedient that a receiver should be appointed he shall nominate a person and submit his name to the District Court which shall authorize the Judge to appoint the person so nominated or pass such other order as it thinks fit.

The appointment may be made either by a Court of first instance, or by a Court of Appellate or revisional jurisdiction. Where a Court of first instance dismisses a suit it becomes *functus officio* save that it may stay execution of its own decree or order for costs. An application therefore made to a Court of first instance after dismissal of the suit but *before* appeal filed, asking that a receiver might be restrained from parting with funds in his hands, pending an appeal was held to be one which the Court had no jurisdiction to grant. The Court's jurisdiction extends no further in regard to a suit which has ceased to be a pending suit.[3]

[1] *Barkat-un-Nissa* v. *Abdul Aziz*, I. L. R., 22 All., 214 (1900).

[2] *V. ante*, p. 23.

[3] *Yamin-ud-Doulah* v. *Ahmed Ali Khan*, I. L. R., 21 Cal., 561 (1894). Author's Law of Injunc-

An Appellate Court may also appoint a receiver. Thus in a suit by a mortgagee for foreclosure or sale in default of payment of his mortgage-debt the Court of first instance when passing decree for the plaintiff, refused, on the plaintiff's application, to appoint a receiver of the rents and profits of the mortgaged property. The plaintiff appealed against the latter part of the decree and after filing a memorandum of appeal obtained a rule for the appointment of a receiver until the hearing of the appeal. The Court of Appeal subsequently made the rule absolute and appointed a receiver until the hearing of the appeal, and when the appeal came on for hearing varied the decree of the Court below by appointing a receiver of the mortgaged property.[1] If therefore a party whose suit has been dismissed desires to have any measure taken for the realization, preservation, better custody or management of property claimed by him, he is at liberty after filing his appeal to apply to the Appellate Court which has authority to make such an order and which will in a proper case make or continue the appointment pending the determination of the appeal. As in the case of original Courts a Court of Appeal may in a proper case review its own decree or order[2] and may for sufficient cause order the execution of decrees passed by Subordinate Courts to be stayed pending the hearing of the appeal[3] or it may advance the appeal. If a receiver has been appointed but the facts proved only warrant the issue of an injunction, the Appellate Court will set aside the order appointing a receiver and in lieu thereof will issue an injunction.[4] The High Court

tions, pp. 70—75. As to review and stay of execution, *See* Civ. Pr. Code, ss. 623, 545, 546, 547.

[1] *Jaikissondas Gungadas* v. *Zenabai*, I. L. R., 14 Bom., 431 (1890); see *Barkat-un-Nissa* v. *Abdul Aziz*, I. L. R., 22 All., 214 (1900); *Grey* v. *Woogra Mohun Thakur*, I. L. R., 28 Cal., 790 (1901).

[2] Civ. Pr. Code, s. 623.

[3] *Ib.*, s. 545.

[4] *Chandidat Jha* v. *Padmanund Singh Bahadur*, I. L. R., 22 Cal., 459 (1895).

may by its revisional powers call for the record of any case in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity, and may pass such order in the case as it thinks fit.[1] When a receiver of a property has been appointed by an Appellate Court pending an appeal to that Court, even when the appeal is no longer pending, he must be regarded as the receiver of the property, of which he has been put in possession, until he is finally discharged, and the Appellate Court has jurisdiction to deal with matters relating to the receiver, including proceedings for contempt, until he has had his accounts passed by it.[2]

The grant of preventive or protective relief is pure discretionary.

§ 5. The exercise of the jurisdiction to appoint a receiver or issue an injunction[3] is not a matter *ex debito justitiæ*, but one which is purely within the discretion of the Court. The latter is not bound to grant such relief merely because it is lawful to do so. But the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal.[4] All questions of discretion are usually questions of degree.[5] Where there is a discretion

[1] Civ. Pr. Code, s. 622. See *Chunilal* v. *Sonabai*, I. L. R., 21 Bom., 328, 330 (1895).

[2] *Grey* v. *Woogra Mohun Thakur*, I. L. R., 28 Cal., 790 (1901).

[3] Act I of 1877, ss. 44, 52.

[4] *Ib.*, s. 22. "Discretion when applied to a Court of law means discretion guided by law. It must be governed by rule and not by humour. It must not be arbitrary, vague, and fanciful, but legal and regular" *per* Lord Mansfield in Wilke's case, 4 Burr., 2539, cited in *Harbuns Sahai* v. *Bhairo Pershad Singh*, I. L. R., 5 Cal., 259, 265 (1879). *See* also remarks in *Queen-Empress* v. *Chagan Dayaram*, I. L. R., 14 Bom., 331, 344, 352 (1890), *per* Jardine, J.

[5] *Ghanasham Nilkant Nadkarni* v. *Moroba Ramchandra Pai*, I. L. R., 18 Bom., 1894 at p. 493.

exercisable the Court is bound to look at all the circumstances of the case.[1] The jurisdiction of the Court to interfere being equitable is governed on equitable principles. And therefore, the Court will, amongst other things, look to the conduct of the person who makes the application.[2] Where an appeal attacks the exercise of discretion, before the Appellate Courts will interfere on this ground in favour of the appellant, the latter must satisfy such Court that the discretion has been improperly exercised.[3]

The appointment as well as the removal of a receiver is also a matter which rests in the sound discretion of the Court.[4] In exercising its discretion the Court should proceed with caution[5] and be governed by a view of the whole circumstances of the case.[6] The power conferred by the Code to appoint a receiver is not to be exercised as a matter of course, and it is not a reason for allowing an application for the appointment of a receiver, that it can do no harm to appoint one.[7] The discretion given by the Code is one that should be used with the greatest care and caution,[8] and the appointment of a receiver is a step which should not be taken without special reasons particularly in the case of a *bonâ fide* possessor with legal

[1] *Ghanasham Nilkant Nadkarni* v. *Moroba Ramchandra Pai*, I. L. R., 18 Bom., 1894 at p. 484.

[2] Act I of 1877, s. 56 (j) : Kerr, 8.

[3] *Shadi* v. *Anup Singh*, I. L. R., 12 All., 438 (1889).

[4] Act I of 1877, s. 44; Kerr, 3; *Sidheswari Dabi* v. *Abhoyeswari Dabi*, I. L. R., 15 Cal., 818, 822, 823 (1888); *Chandidat Jha* v. *Padmanand Singh Bahadur*, I. L. R., 22 Cal., 459, 464, 465 (1895). Ex parte *Jijai Amba*, I. L. R., 13 Mad., 390 (1890) [removal of receiver].

[5] *Mun Mohiney Dossee* v. *Ichamoyee Dossee*, 13 W. R., 60 (1870); *Prosonomoye Devi* v. *Beni Madhub Rai*, I. L. R., 5 All., 556 (1883).

[6] *Owen* v. *Homan*, 4 H. L., 1033; *Sidheswari Dabi* v. *Abhoyeswari Dabi*, supra; *Chandidat Jha* v. *Padmanand Singh Bahadur*, supra.

[7] *Prosonomoye Devi* v. *Beni Madhub Rai*, I. L. R., 5 All., 556 (1883).

[8] *Prosonomoye Devi* v. *Beni Madhub Rai*, I. L. R., 5 All., 556 (1883).

title.[1] The main principles upon which such discretion should be exercised have been laid down in the case of *Owen* v. *Homan*,[2] and those principles have been held to be as equally applicable in this country as in England.[3] In that case Lord Cranworth said :—"The receiver, if appointed in this case, must be appointed on the principle on which the Court of Chancery acts, of preserving property pending the litigation, which is to decide the right of the litigant parties. In such cases the Court must of necessity exercise a discretion as to whether it will or will not interfere by this kind of *interim* protection of the property. Where, indeed, the property is as it were *in medio*, in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble. Such is the case when a receiver of a property of a deceased person is appointed pending a litigation in the Ecclesiastical Court as to the right of probate or administration.[4] No one is in the actual lawful enjoyment of property so circumstanced, and no wrong can be done to any one by taking it, and preserving it for the benefit of the successful litigant. But where the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment, the case is necessarily involved in further questions. The Court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant ; in some case an irreparable wrong. If the plaintiff should eventually fail in

[1] *Gossain Dulmir* v. *Tekait Hetnarain*, 6 C. L. R., 467, 469 (1880).

[2] 4 H. L., 1032, 1033.

[3] *Sidheswari Dabi* v. *Abhoyeswari Dabi*, supra ; *Chandidat Jha* v. *Padmanand Singh Bahadur*, supra.

[4] See *Joykally Dabee* v. *Shib Nath Chatterjee*, Bourke, Test, 5 (1865) ; *Yeshwant Bhagwant Phatarpakar* v. *Shankar Ramchandra Phatarpakar*, I. L. R., 17 Bom., 388 (1892).

establishing his right against the defendant, the Court may by its *interim* interference have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation. In all cases, therefore, where the Court interferes by appointing a receiver of property in the possession of the defendant before the title of the defendant is established by decree, it exercises a discretion to be governed by all the circumstances of the case."[1]

As in the case of injunctions, the Court will always look to the conduct of the party who makes the application for a receiver and will not interfere unless his conduct has been free from blame;[2] and parties who have acquiesced in property being enjoyed against their own alleged rights cannot come to the Court for this form of relief.[3] The distinction which exists between the cases in which the Court will exercise its discretion to grant an injunction or to appoint a receiver respectively has been already mentioned.[4] A stronger case is generally required for the appointment of a receiver than for the issue of an injunction. It may well be that circumstances which will warrant the issue of an injunction will not warrant the appointment of a receiver. Accordingly, while the Court may in its discretion refuse to appoint a receiver, it may yet consider the case to be one which calls for an injunction. The opinion of the Court of first instance is, in these matters, of great weight. It has all the facts and the parties before it, and is probably the best tribunal to decide whether it is necessary or expedient, having regard to the circumstances of the case

[1] *Owen* v. *Homan*, supra, 1032, 1033.

[2] Kerr, 8; see *Baxter* v. *West*, 28 L. J. Ch., 169; cf. *Wood* v. *Hitchings*, 2 Beav., 297.

[3] Ib., *Gray* v. *Chaplin*, 2 Russ., 147; *Skinner's Society* v. *Irish Society*, 1 M. & Co., 162.

[4] v. *ante*.

that a receiver should be appointed.[1] And a party who in appeal attacks the exercise of this discretion should show that the discretion has been improperly so exercised.[2]

The exercise of the power being thus discretionary, it would be difficult, even if it were possible, with any precision to mark out the limits within which it is ordinarily circumscribed ; but some of the principles which govern the discretion of the Court in such appointment will be found considered more fully and in detail hereafter in those Chapters which specially treat of the cases in which a receiver may be appointed.

The best guides in the matter of interference by way of injunction and receiver have been judicially stated to be the principles which determine the action of Courts of Equity in England.[3] It is, in fact, on these principles that the relief given in Indian Courts by injunction and receiver is, in the main, founded ; and this relief is, in substance, the same as that granted by Courts in England. But since in India the Courts must follow the words of the statute, and since the rules for the guidance of Indian Courts are to be found in the Specific Relief Act, the English cases to which reference can be made are only of use as illustrative of the principles embodied in the sections of the Act from the aspect that the Courts of Chancery in England have had to treat matters of a similar description. Yet when there is no specific rule, the Mofussil Courts and Presidency High Courts (the latter in their appellate jurisdiction) will be guided by the English

[1] *The Oriental Bank Corporation* v. *Gobinloll Seal*, I. L. R., 10 Cal., 713, 737 (1884), *per* Garth, C. J.

[2] See *Shadi* v. *Anup Singh*, I. L. R., 12 All., 438 (1889).

[3] See *Nusserwanji Merwanji Panday* v. *Gordon*, I.L.R., 6 Bom., 266, 284, 279; *Sidheswari Dabi* v. *Abhoyeswari Dabi*, I. L. R., 15 Cal., 818, 822, 823 (1888); *Chandidat Jha* v. *Padmanand Singh Bahadur*, I. L. R., 22 Cal., 459, 464, 465 (1895), and cases cited in Author's Law of Injunctions, pp. 5, 6.

case-law, so far as it is applicable, not because it is English but because it is in accordance with that rule of equity and good conscience which these Courts are in such circumstances enjoined to follow. The Presidency High Courts, in the exercise of their ordinary original civil jurisdiction, may, in such circumstances, have recourse to the equitable jurisdiction which the High Courts have inherited from the Supreme Courts, which were, in their turn, vested with the general powers of the Court of Chancery. The law relating to injunctions and receivers in this country being thus practically the same as that which prevails in England resort may be had to the English case-law bearing on these subjects, and as the law of the United States is in general accordance with and founded upon English law, the decisions of the Courts of that country may also be referred to and cited in aid of the interpretation of the provisions contained in the Indian Codes and Acts.[1] The late Supreme Court of Bengal held that American decisions "are not authorities to which we must yield, as to the decisions of our own superior Courts; but they are in general well deserving of attention as able expositions of the law:"[2] and again, "with respect to the American decisions, they are not authority with us, though often extremely valuable as guides to the formation of a correct judgment."[3] And more recently in England Cockburn, C. J., observed as follows:—"The case before us presents itself, therefore, so far as our Courts are concerned, as one of the first impression, on which we have to declare, or perhaps, I may say, practically, to make the law. I am glad to

[1] *See* cases cited in Author's Law of Injunctions, pp. 6—8.

[2] *Malcolm* v. *Smith*, Taylor's Reports, 283, 288 (1848), *per* Sir L. Peel, L. J.

[3] *Braddon* v. *Abbott*, id., 342, 359: (1848) *per* Sir L. Peel, L. J. In this and the case last mentioned American decisions were cited at the Bar.

think that in doing so we have the advantage of the assistance afforded to us by the decisions of the American Courts and the opinions of American jurists, whom accident has caused to anticipate us on this question. And, although the decisions of the American Courts are, of course, not binding on us, yet the sound and enlightened views of American lawyers in the administration and development of the law—a law, except so far as altered by statutory enactment, derived from a common source with our own, entitle their decisions to the utmost respect and confidence on our part."[1]

The Presidency High Courts possess the same powers with regard to the appointment of a receiver as are possessed and exercised by the Courts in England under the Judicature Act of 1873, and the practice in respect of these matters should be the same.[2] So also the Code in the matter of the appointment of receivers gives a wide discretion to the Court. But this power is not, however, greater than that exercised by the Courts in England ; and it must be exercised on the same principle, that is to say, with a sound discretion, on a view of the whole circumstances of the case, not merely circumstances which might make the appointment expedient for the protection of the property, but all the circumstances connected with the right which is asserted and has to be established.[3] In the earlier of the cases just cited it was said : "The principles to which we refer are stated in Kerr on Receivers,[4] by Lord Cranworth in *Owen* v. *Homan*[5] and

[1] *Scaramanga* v. *Stamp*, L. R., 5 C. P. D., 295, 303 (1880).

[2] *Jaikissondas Gangadas* v. *Zenabai*, I. L. R., 14 Bom., 431, 434 (1890).

[3] *Sidheswari Dabi* v. *Abhoyeswari Dabi*, I. L. R., 15 Cal., 818, 822, 823 (1888), *per* Macpherson and Gordon, JJ., approved in *Chandidat Jha* v. *Padmanand Singh Bahadur*, I. L. R., 22 Cal., 459, 464, 465 (1895), *per* Ghose and Rampini, JJ.

[4] 2nd Ed., p. 3.

[5] 4 H. L. C., 997, 1032.

in *Clayton* v. *The Attorney-General*.[1] We see no ground for the contention that these principles were not applicable in this country. They are adopted to prevent a wrong to the defendant which might equally be done here if they were not followed."[2] And the Court added that the principles referred to have not been relaxed since the passing of the Judicature Act in 1873.[3] It must not, however, be overlooked that the circumstances of this country are, in many respects, very different from those of England. Not only may there be in India rights to be protected which are unknown to English law, but interests of which it does take cognizance may here require protection by injunction, or otherwise, in sets of circumstances in which it is not necessary to grant relief in England, or the converse may be the case. So in the matter of rules of procedure and practice, though the utmost respect should be paid to the wisdom and authority of English Courts, yet Courts in India are by no means bound to adopt all such rules as the Equity Courts in England may have established. Further as the mode of living in this country is different from that in England not only may such mode of life give rise to new rights, it may even in the case of such rights as are enforceable in both countries, present in particular cases new facts for consideration upon the question of the issue of an injunction or the assessment of damages.[4] So also in the matter of receivers the Court's decision may be affected by circumstances peculiar to this country. Thus in considering the question whether a power to a receiver to raise money on the property itself may be necessary to its own preservation,

[1] Cooper's Cases in Chancery, Vol. I, p. 97.

[2] *Sidheswari Dabi* v. *Abhoyeswari Dabi*, 822, 823.

[3] *Ib.*, 823.

[4] *See* cases cited in Author's Law of Injunctions, pp. 10—12.

regard must be had to the conditions under which estates are held in India.[1] Again, English rules and decisions may, in particular cases, be inapplicable owing to the fact that the relations which existed between the Court of Chancery and the Courts of Common Law in England were very different from those between the High Courts and the Mofussil Courts in India, as were also the respective functions and powers of these Courts. And though legislation may give to English Courts powers similar to those possessed by the Courts of this country, their discretional exercise may here be different owing to circumstances peculiar to the former Courts existing anterior to such legislation. Lastly, where, as in certain instances, English law deals with rights peculiar to itself, their consideration is rendered here unnecessary; where, on the other hand, rights which require protection are peculiar to this country, English rules and decisions will be of service, if at all only by way of analogy; while as to such as are common to both countries differences both in procedure and substantive law may render these rules and decisions partially or wholly inapplicable.[2]

Enforcement of orders and decrees.

§ 6. Assuming that in any particular case the Court has jurisdiction to grant relief, and that the circumstances are such that it would be a proper exercise of its discretion to do so, and that it has in fact done so either by ordering an injunction to issue or a receiver to be appointed, it remains to be considered how these orders are enforced and made effectual to secure the redress sought by those in whose favour they are made. A judgment of the Court which is *in personam* may be enforced by process *in personam*, that is, by attachment of the person when the

[1] *Poreshnath Mookerjee* v. *Omerto Nath Mitter*, I. L. R., 17 Cal., 614, 619 (1890), *per* Petheram, L. J.

[2] *See* cases cited in Author's Law of Injunctions, pp. 12, 13.

person is within the jurisdiction, or by sequestration of the goods or lands of the defendant, when these are within the jurisdiction of the Court, until the defendant do comply with the judgment or order of the Court.[1] This power of attachment, which has been termed the key-stone of the equitable jurisdiction, results from the first principles of judicial establishments and must be an inseparable attendant upon every superior tribunal. Under the authority conferred by the Charters of the Supreme Courts and continued by their own Letters Patent, the High Courts in India possess the power of enforcing obedience to their orders by attachment for contempt,[2] and they have all the powers of a Court of Equity in England for enforcing their decrees *in personam*.[3] The jurisdiction of the High Court to imprison for contempt is a jurisdiction that it has inherited from the old Supreme Court, and was conferred upon that Court by the Charters of the Crown which invested it with all the powers and authority of the then Court of King's Bench and of the High Court of Chancery in Great Britain, and this jurisdiction has not been removed or affected by the Civil Procedure Code.[4] The power of the Mofussil Courts to commit for contempt otherwise than under the authority of special statutory enactments conferring, or of case-law recognising, that power, is a matter of doubt.[5]

[1] *Penn* v. *Lord Baltimore*, 1 Ves., 444; v. *ante*.

[2] *Hassonbhoy* v. *Cowasji Jehangir Jassawalla*, I. L. R., 7 Bom., 1 (1881); *Navivahoo* v. *Narotam Das Candas*, I. L. R., 7 Bom., 5 (1882).

[3] *H. H. Shrimant Maharaj Yashvantrav Holkar* v. *Dadabhai Cursetji Ashburner*, I. L. R., 14 Bom., 353, 359 (1890); *per* Sargent, C. J., citing *Martin* v. *Lawrence*, I. L. R., 4 Cal., 655 (1879); *Hassonbhoy* v. *Cowasji Jehangir Jassawalla*, I L. R., 7 Bom., 1 (1881).

[4] *Martin* v. *Lawrence*, I. L. R., 4 Cal., 655 (1879); *per* White, J., *Hassonbhoy* v. *Cowasji Jehangir Jassawalla*, supra, 4; *Navivahoo* v. *Narotamdas Candas*, supra, 12, 13; *King-Emperor* v. *Timmal Reddi*, I. L. R., 24 Mad., 523, 548 Note (1900).

[5] See *Hassonbhoy* v. *Cowasji Jehangir Jassawalla*, supra at

A receiver is an officer of the Court, and the Court will therefore see that he performs his function and will protect the agent appointed under its orders.[1] Being such officer his possession is simply the possession of the Court, and to such an extent is this the case, that any attempt to disturb that possession, without the leave of the Court, is a contempt of Court.[2] Thus an attachment of money in the hands of the receiver is an interference with the Court's possession through its officer, the receiver, and may not therefore be made without the Court's leave first obtained.[3] The mere appointment of a receiver operates as an injunction against the parties, their agents and persons claiming under them, restraining them from interfering with the possession of the receiver except by permission of the Court.[4] The Court requires and insists that application should be made to it for permission to take possession of any property of which the receiver has taken, or is directed to take possession. The rule is not confined to property actually in the hands of a receiver. The Court will not permit anyone, without its sanction and authority, to intercept or prevent payment to the receiver of any property which he has been appointed to receive, though it may not be actually in his hands.[5] The form in which the Court usually enforces its orders in the matter of receivers is in extreme or aggravated cases by committal to prison, or ordinarily by ordering the party in contempt to pay the costs and

p. 3; *Navivahoo* v. *Narotamdas Candas*, supra at pp. 13. 14.

[1] *Dinnonauth Sreemonee* v. *C. S. Hoag*, 2 Hay, 395, 397 (1863).

[2] *Wilkinson* v. *Gangadhar Sirkar*, 6 B. L. R., 486, 487 (1871); Kerr, 139.

[3] *J. Kahn* v. *Ali Mahomed Haji Umer*, I. L. R., 16 Bom., 577 (1892); followed in *Mahommed Zohuruddeen* v. *Mahommed Nooroddeen*, I. L. R., 21 Cal., 85 (1893). The sheriff may not disturb the possession of a receiver. Kerr, 173, 174.

[4] *Mahommed Zohuruddeen* v. *Mahommed Nooroddeen*, supra at p. 91.

[5] Kerr, 161; *Ames* v. *Birkenhead Docks*, 20 Beav., 353.

expenses occasioned by his improper conduct and the costs of the application. In cases where the contempt consists in entering upon land in the possession of a receiver or in bringing an action against the receiver or against a party over whose property a receiver has been appointed, the Court restrains by injunction the trespass or prosecution of the action and orders the party in contempt to pay the costs of the application.[1] The High Courts in India being Superior Courts of Record have full powers to punish for contempt of their orders committed either directly, or through interference with the action of officers appointed by them.[2] It has already been observed that the nature and extent of the powers of Mofussil Courts in the matter of contempt is doubtful in the absence of express statutory provision on the subject. The Civil Procedure Code does not directly provide for the case of the breach of, or the enforcement of, orders under section 503 (otherwise than in execution of a decree), as it does in the case of interlocutory orders under sections 492, 493. But the order appointing a receiver operates *per se* as an injunction and, if necessary, for the purpose of giving express effect to the order, an injunction may be granted in terms.

Although ordinarily the receiver does not himself apply for commencing proceedings by way of contempt, and, generally speaking, action is taken by the parties beneficially interested, there is nothing to prohibit his doing so.[3] When a receiver is appointed by an Appellate Court, the latter has, even although the appeal be no longer pending, jurisdiction to deal with matters relating to the receiver, including proceedings for contempt, until he has had his accounts passed by it.[4]

[1] Kerr, *op cit.*, 171—173.

[2] v. *ante*, p. 40, and cases there cited.

[3] *Grey* v. *Woogramohun Thakur*, I. L. R., 28 Cal., 790 (1900).

[4] *Ib.*, v. *ante*.

A receiver may himself be guilty of contempt in two ways; where he refuses or neglects to comply with the order of the Court appointing him; and where there is a conflict of receivers, and one or two or more receivers of the same property interfere with the possession of another receiver or prevent or hinder the due discharge of duty by that other receiver in respect of the property in dispute. In such cases the Court will first determine the question of priority and direct as to the transfer of the property before it will entertain proceedings for contempt. A receiver being a mere officer of the Court is bound to obey every order of the Court, and if he neglects or refuses to comply therewith, he stands in no better position than any other person, and may be punished in the same way.[1]

A receiver, appointed under section 56 of the Land Registration Act, is not a public servant within the terms of sections 174, 175, 186 and 188 of the Penal Code. Such a receiver is not a public servant legally competent to issue an order directing persons to attend before the Collector with their collection papers and rent receipts, and disobedience to such an order does not constitute an offence either under section 174 or section 175 of the Penal Code. An order by such a receiver forbidding persons to pay rent to any person other than the receiver is not an order promulgated by a public servant lawfully empowered to promulgate such order, and disobedience to such order is not an offence within the terms of section 188 of the Penal Code. Persuasion addressed to tenants in the absence of such receiver not to pay rent to him is not an obstruction of the receiver within the provisions of section 186 of the Penal Code.[2]

[1] Beach, § 248; where also a liquidator is in possession the receiver will be in contempt if he move against him without leave. Kerr, 174, 175.

[2] *Ebrahim Sircar* v. *Emperor*, I. L. R., 29 Cal., 236 (1901). *See* further as to the receiver's possession and contempt, Ch. II, *post*.

CHAPTER II.

THE APPOINTMENT.

§ 7. Who may be appointed—§ 8. Subject-matter of appointment—§ 9. Time when Receiver may be appointed - § 10 Time from which appointment takes effect—§ 11. Duration of appointment § 12. Mode of appointment—§ 13. Security—§ 14. Order cannot be questioned collaterally—§ 15. Effect of appointment—§ 16. Possession and interference with possession of Receiver—§ 17. Suits and applications against Receiver.

Who may be appointed.

§ 7. A RECEIVER being an impartial person as between the parties, and being the officer and representative of the Court in the management and control of the property or fund in controversy, considerable importance attaches to the question of his selection as well as to his qualifications and competency for the management of the property entrusted to his charge. The Court may make the appointment itself directly without a reference, or it might, according to the former English practice, refer the matter to a master to make the selection in which case the parties are at liberty to appear before the officer and to nominate suitable persons whose qualifications and competency are passed upon by the master who makes the appointment and reports his selection to the Court.[1] In this country the receiver is appointed generally directly or by reference by the High Court or District Court, Subordinate Courts following the procedure laid down by section 505 of the

[1] High, § 63.

Code. In the High Court in cases where the parties agree to a particular private person being appointed receiver, the Court so appoints him ; where, however, the parties cannot agree, the Official Receiver is appointed. Where the property is land paying revenue to Government or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property.[1]

In cases other than those in which the Court Receiver or Collector is appointed any person may be selected subject to certain general rules which have their basis in the nature of the office of receiver and the functions to be discharged by him. Inasmuch as a receiver is required to be an impartial person the person chosen should, as a general rule, be wholly disinterested in the subject-matter of the suit. The Court may, however, with the consent of all the parties or, in very special cases, without such consent appoint as receiver a person who is mixed up in the subject-matter of the suit if it is satisfied that the appointment would be attended with benefit to the estate. So a mortgagee in possession and owner have been appointed ; and it is common practice in partnership cases to appoint a party to the action where the other party consents, though as already stated the appointment may be made without such consent in very special cases. A party will not, however, be appointed unless upon his undertaking to act without salary, and when appointed he does not thereby lose his privilege as party in the cause.[2] *A fortiori* while the fact of relationship of a person to either of the parties is not *per se* an

[1] Civ. Pr. Code, s. 504.

[2] Kerr, 115, 116.

absolute disqualification for the receivership yet it must be allowed to have its proper weight in connection with other circumstances. And in a case where the person appointed was the brother of one of the parties and the son of one claiming to be a large creditor, and was admitted by the plaintiff to have taken an active part in the controversy as his friend and agent, he was regarded as too much enlisted in the cause to permit him to be as unbiased and impartial as a receiver should be, and was therefore removed. It is also regarded as exceedingly objectionable to appoint as receiver a person who is in the interest of the defendant against whom the appointment is made.[1]

Apart from the question of interest the Court will consider the character and qualifications of the person proposed; his familiarity with the kind of property to be managed, his place of residence with reference to the estate to be managed, his ability to spare sufficient time for the duties of his office and other similar facts bearing upon the appointment.[2]

The second general rule is that the Court is averse to appointing as receivers persons occupying relations of trust as trustees, executors, or otherwise towards the property or estate which is the subject of the receivership. The reason of this rule is that the Court is exceedingly jealous of appointing any person to a receivership whose duty it would otherwise be to watch the proceedings of the receiver or to call him to an account for his management. The Court in this class of cases expects the trustee to watch the proceedings with an adverse eye and to see that the receiver does his duty. The *cestui que trust*, if he is to have a receiver, is entitled to the superintendence of the trustee as a check. The rule has been extended

[1] High, § 67.

[2] *Ib.*, §§ 64, 68, 69; Kerr, 119, 120.

to other persons than trustees. Thus it has been held that as it is the duty of a next friend to watch the accounts and check the conduct of a receiver of the infant's estate the two characters are incompatible with each other; and upon similar grounds it has been held that a solicitor in the cause cannot be appointed receiver because it is his duty to contest the receiver's accounts. In this instance also as with regard to interest the Court will in special cases appoint a trustee where such appointment would be beneficial to the estate as where the trustee has a peculiar knowledge of the estate, or no one else can be found who will act with the same benefit to the estate.[1]

Where an application is made to appoint a receiver and an application is also made to appoint a liquidator, the Court will, in order to avoid expense and inconvenience, take care that the receiver and the liquidator should be the same person in every case where that can properly be done, and the Court will usually, though not always, remove a receiver appointed before the commencement of the winding up proceedings or after a winding up order has been obtained, and appoint the liquidator to be receiver in the place of the receiver to act as receiver as well as liquidator.[2]

In all cases the selection of a particular person for the receivership is regarded as a matter of judicial discretion to be determined by the Court according to the circumstances of the case. The exercise of this, like all other matters of judicial discretion, will rarely be interfered with by an appellate tribunal, and it may be stated, as a

[1] High, §§ 70, 74, 75; Kerr, 116–119. Though there is no inflexible rule, a trustee should only be generally appointed upon the term of his having no remuneration. *Re Bignell*, 1892, 1 Ch., 59; *Sutton* v. *Jones*, 15 Ves., 584; *Pilkington* v. *Baker*, 24 W. R., 234.

[2] Kerr, 121, 122.

general rule, that, to induce an Appellate Court to interfere with the decision of an inferior tribunal in the selection of a receiver, it is necessary to show some "overwhelming objection in point of propriety of choice, or some objection fatal in principle" to the person named.[1]

Subject-matter of appointment.

§ 8. Under the provisions of section 503 of the Code a receiver may be appointed of *any* property, whether moveable or immoveable, provided it is the *subject-matter of a suit* or *under attachment*. Nothing in this section authorises the removal from the possession or custody of property under attachment of any person whom the parties to the suit or some or one of them have or has not a present right to remove. Under section 504 where the property is land-paying revenue to Government, the Collector may with his consent be appointed. According to English law a receiver may be appointed of the rents and profits of real estate and also of all personal estate which may be taken in execution at law or is considered in equity as assets.[2] It is not necessary that the property should be in England or indeed in any of the British dominions,[3] and the same rule applies in this country.[4] Inasmuch as a receiver may be appointed of any property it is not necessary to enumerate the cases in which appointments have been made. Besides the more ordinary cases receivers have been appointed over a newspaper; equity of redemption; a fund in another Court payable to a judgment-debtor; income of a trust fund; judgment-debtor's interest in a policy of insurance; reversionary legacy and interests: ships, their gear, freight and

[1] *Cookes* v. *Cookes*, 2 De G. J. & S., 526 at p. 528, *per* Knight Bruce, L. J.; *Perry* v. *Oriental Hotels Company*, L. R., 5 Ch. App., 420; High, § 65.

[2] Kerr, 105.

[3] *Ib.*, 112.

[4] v. *ante*, Ch. I.

machinery : profits of a business[1] and over pensions which may lawfully be assigned,[2] etc. It has, however, been held that there cannot be a receiver of pay, half pay or salary or pension the assignment of which is void as being against public policy,[3] or of the profits of an ecclesiastical benefice since a beneficed clergyman is prohibited from charging the fruits of his living.[4] In all cases the property must be the subject-matter of a suit or under attachment. Thus in a suit upon a mortgage the mortgaged property was directed to be sold and the time of grace had expired. An application was then made by the judgment-debtor to the Court of execution for the appointment of a receiver both as regards the mortgaged property as well as other properties belonging to the judgment-debtor. It was, however, *held* that the Court had no power to appoint a receiver of properties other than the subject-matter of the suits, and as regards the mortgaged property a receiver could not be appointed on the mere ground that the property would not fetch so much by forced sale as it would by sale under a private contract. If it were so, the result would be that in any case a judgment-debtor could require that a decree be not executed in the manner provided by law, but that a receiver be appointed.[5]

[1] Kerr, 104—111, *et ibi casas.*

[2] *Heald* v. *Hay*, 3 Giff., 467; *Willcock* v. *Terrell*, 3 Ex. D., 323; *Dent* v. *Dent*, 1 Pr. & D., 367; Kerr, 107.

[3] *Apthorpe* v. *Apthorpe*, 12 P.D., 192; Ex parte *Huggins*, 21 Ch. D., 85; Re *Mirams* (1891), 1 Q. B., 594; *Cooper* v. *Reilly*, 1 R. & M., 560; Kerr, 107; *contra* where the assignment of salary is not void. Re *Mirams*, supra. *See* as to pensions and salaries notes to s. 266 of O'Kinealy's Civil Procedure Code.

[4] Kerr, 111.

[5] *Latafut Hossein* v. *Anunt Chowdhry*, I. L. R., 23 Cal., 517 (1896); in *Kartic Nath Pandy* v. *Padmanund Singh*, I. L. R., 11 Cal., 496 [1885], it was argued that the rents payable by the tenants formed no part of the subject-matter of the suit; it was held that if the suit had been simply for recovery of arrears, s. 503 would not have applied, but that in fact the suit was for the recovery of the tenure itself. *See* also in which question was raised as to what was the subject-matter of

Ordinarily a receiver should be appointed only of so much of the property as is in dispute.[1] Where, therefore, the property in dispute in a suit was not the entire moveable and immoveable property in the possession of the defendant, but the half share to which the plaintiff laid claim, a Court was held to have acted beyond its powers in appointing a receiver of the entire property in the hands of the defendant and not merely of the share claimed by the plaintiff.[2]

In however suits for partition of joint estates the Court has jurisdiction to place the whole of the joint estate out of which the plaintiff seeks to have his share partitioned in the hands of a receiver, and to order that the latter shall be at liberty to raise money on the security of the whole of such joint estate.[3] As regards undivided shares, it has been said that to appoint a receiver and to issue an injunction which shall affect an undivided half share only is an impossibility.[4] But in an earlier decision[5] the Court remarked as follows :—"Then under section 92 in any suit in which it shall be shown to the satisfaction of the Court that any property which is in dispute in the suit is in danger of being wasted, damaged or alienated it shall be lawful to issue an injunction. The property in

suit. *Subramanya* v. *Appasami*, I. L. R., 6 Mad., 355–356 (1883); *Yeshwant* v. *Shankar*, I. L. R., 17 Bom., 388, 391, 392 (1892).

[1] *Joynarain Geeree* v. *Shibpersad Geeree*, 6 W. R., Misc., 1 (1866).

[2] *Ib.*

[3] *Poreshram Mookerjee* v. *Omerto Nauth Mitter*, I. L. R., 17 Cal, 614 (1890).

[4] *Mun Mohinee Dossee* v. *Ichamoyee Dossee*, 13 W. R., 60 (1870), but see *Joynarain Geeree* v. *Shibpersad Geeree*, 6 W. R., Misc., 1 (1866), *ante*.

[5] *Joynarain Geeree* v. *Shibpersad Geeree*, 6 W. R., Misc., 1 (1866). "But he (Principal Sudder Amin) has gone beyond the very utmost limit to which he could possibly have gone under s. 92, because he has placed under attachment and appointed a receiver for the entire property moveable and immoveable in the hands of the defendant and not merely the share claimed by the plaintiff," *ib.* at p. 2; and see *Buddinath Paul Chowdry* v. *Bycauntnath Paul Chowdry*, 2 Tayl. & Bell, 192,

dispute in this suit was not the entire moveable and immoveable property in the possession of the defendant but the half share to which the plaintiff laid claim. If, therefore, it were shown to the satisfaction of the Court that the defendant in possession was likely to damage or make away with the half share which the plaintiff claimed it was open to the Court to make an order under section 92." Receivers have, however, been appointed of undivided shares though equity is generally averse to extending the aid of a receiver as between joint owners or tenants in common.[1] It has been held that a plaintiff claiming a moiety of an estate as a tenant in common with the defendant may have a receiver of the rents and profits of such moiety when defendant is in possession of the whole ; and he may also have an injunction to restrain the defendant from receiving the rents of such moiety, as well as an order upon the tenants of that part of the estate to attorn to the receiver.[2] So it has been ordered that a tenant in common in possession should give security to his co-tenant for the portion of rents due him, or in default thereof, that a receiver be appointed.[3] And in the case of equitable tenants in common of realty the legal title to which is in a trustee for the benefit of the co-tenants, the fact that the trustee has put one of the co-tenants in possession will justify a receiver on behalf of the other tenants over their own shares, but not over the entire property, since the tenant in possession is entitled to the possession of his own share of the property.[4] But when the conduct of the defendant in possession is such as to amount to an exclusion of his

[1] High, § 606.

[2] *Hargrave* v. *Hargrave*, 9 Beav., 549.

[3] *Street* v. *Anderton*, 4 Bro., C. C., 414.

[4] *Sandford* v. *Ballard*, 30 Beav. 109.

co-tenants, they are entitled upon the hearing to a receiver of the whole property.[1]

In the undermentioned suits,[2] the first of which was for an account and for partition of joint-estate and the second for construction of the will and administration of the estate of the great grandfather of the plaintiff in the first-mentioned suit, various proceedings were had, and ultimately a settlement was arrived at, under which it was agreed that the defendants in the first suit should pay to the plaintiff a certain sum of money by instalments, and that certain immoveable properties which had been allotted to the defendants under the returns of the Commissioners of partition made in these suits, should be charged with payment of this sum with liberty to the plaintiff in default of payment of two successive instalments to have the charged properties sold by order of Court. All the properties were situated without the jurisdiction, and some of the defendants were residing without the jurisdiction. The plaintiff subsequently applied for the appointment of a receiver of the charged properties on the ground that his security was imperilled. Two of the defendants consented to the appointment, but others opposed it on the grounds that the Court had no power or jurisdiction to appoint a receiver, and that if it had, no case had been made out for the appointment. The Court stated as follows: "The first objection

[1] *Id.*, 33 Beav., 401. *See* High, § 605; Kerr, 96, 97; *see* also *Calvert* v. *Adams*, 2 Dickens, 478; *Evelyn* v. *Evelyn*, id., 800. The point discussed in the text is as to the power of the Court to appoint a receiver of a share which is of course different from that whether the Court will or will not interfere as between joint owners or tenants in common as to which *see* High, §§ 603, 606. *See* in this connection Bengal Tenancy Act, s. 188, and as to the separation of Government revenue, s. 10, Act XI of 1859.

[2] *Radhanath Mukerjee* v. *Paresh-nath Mukerjee*, suit 567 of 1874; *Kumal Kumaree Debi* v. *Paresh-nath Mukerjee*, suit 307 of 1875, Calcutta H. C.

taken is that all the properties are situate out of the jurisdiction of the Court, and that the Court has no power to appoint a receiver over them, and authorities have been cited as to the sales of the properties outside the jurisdiction of the Court, and reference has also been made to cases where decrees have been made for maintenance and properties situate outside the jurisdiction charged with the payment of such maintenance. These authorities have not much bearing on the present question. The properties in suit have been partitioned by this Court, and I should be inclined to hold that the Court has full power to appoint a receiver of those properties to protect the rights of the plaintiff created by the compromise. The difficulty is whether a sufficient case has been made out for a receiver I do not think the grounds relied on are sufficient to justify the appointment of a receiver of the whole estate.... I think the course I ought to take is to appoint a receiver of the *one-fourth* share of the two defendants who consent and refuse the application as to the three-fourths."[1] Against this order the consenting defendants appealed on the grounds amongst others that though the appellants consented to the order as asked for by the plaintiff for the appointment of a receiver of the whole of the said properties, yet they never consented to the appointment of a receiver of their own one-fourth share only: and that the Court had no jurisdiction or power to appoint a receiver of the one-fourth share. The appeal, however, was compromised. By consent the receiver was discharged upon the appellants' undertaking to pay a certain sum to the respondents within a time specified.[2]

The subject-matter of the appointment must be property moveable or immoveable which is "*the subject of*

[1] *Id.*, Cor. Sale, J., 13th July 1899.

[2] *Id.*, Appeal from Order No. 27 of 1899 (Jan. 24, 1900).

a suit"[1] or is "*under attachment.*" When it was contended that in a suit for partition of joint estate the sole purpose was to give the plaintiff possession of a divided share and that the only property which was the subject of the suit was the plaintiff's share and that the Court had no jurisdiction to place anything more than that share in the hands of a receiver, it was held that the property in suit was the whole joint estate, inasmuch as until it was partitioned, the plaintiff had an interest in every portion of it; that in a suit for partition of a joint estate the words "property the subject of a suit" in section 503 of the Code mean the whole joint estate, and the words "the owner" in section 503 (*d*) means the whole body of owners to whom the joint estate belongs: and thus consequently the Court has jurisdiction to place the whole of a joint estate out of which a plaintiff seeks to have his share partitioned in the hands of a receiver and to order that a receiver so appointed shall be at liberty to raise money on the security of the whole of such joint estate.[2]

Where in a testamentary suit it was argued that the property of the deceased was not the subject of a suit it was said—"possibly not directly, but the present suit is to determine who is to have the possession and management of the property of the deceased, in fact who is to be the person in whom all the rights of the deceased are to vest and thus become the legal owner. If a suit were brought on the civil side to determine who had the right to the possession and management of pro-

[1] Under s. 92 of the earlier Code the words were "*property which is in dispute in a suit,*" see *Joynarain Geeree* v. *Shibpersad Geeree*, 6 W. R., Misc., 1 (1866).

[2] *Poreshnath Mcokerjee* v. *Omerto Nauth Milter*, I. L. R., 17 Cal., 614 (1890). This is in accordance with the practice of the Court of Chancery under the Judicature Act and with the practice of that Court before the passing of that Act even where there had been no exclusion, *ib.* at p. 618.

perty, the provisions of the Specific Relief Act I of 1897 would ordinarily require a prayer to be inserted for possession of the property, but I cannot see the substantial difference as regards *interim* remedies between a suit in this form and a suit on the testamentary side, the result of which will be to declare that, by virtue of the provisions of a will, a certain person has the right to stand in the shoes of a deceased owner and thus be entitled to have the possession and management of all his property. It seems to me that the property is the subject of the suit in the one case directly because possession is sought, and on the other because the decree will determine who is to have authority over, and to be entitled to get possesion of, certain property which is set out in a schedule to the petition for probate or letters of administration. Consequently I see nothing in the law relating to procedure which would prevent the appointing a receiver in this case without regard to any consent on the part of the plaintiff."[1]

Where a zemindar who was indebted to certain Chettes executed a bond in their favour and hypothecated the income which he might derive from certain villages, and the Chettes brought a suit against the zemindar to enforce payment of the debt upon the security of the income hypothecated, and asked for the appointment of a receiver before judgment, the Court said:—"If it were necessary to decide the point we should hesitate to say that the income of the villages was 'the subject of the suit' within the meaning of section 503 of the Code. The subject of the suit is the debt which is claimed, and the sale of the hypothecated income is merely a mode of obtaining payment."[2]

[1] *Yeshwant Bhagwant Phatarparkar* v. *Shankar Ramchandra Phatarparkar*, I. L. R., 17 Bom., 388, 391, 39 (1892).

[2] *Subramanya* v. *Appasami*, I. L. R., 6 Mad., 355 (1883), overruled on

Time from which appointment takes effect.

§ 10. Where an order is made that a certain person upon his giving security be appointed receiver, the order appoints the receiver conditionally upon his giving security only and a receiver becomes such on giving security. When he has done that he can take possession. He is not legally clothed with the character of receiver nor able to perform its duties until he has given security, and his recognisances are perfected. The appointment of a receiver so far as it affects the rights of creditors or third parties dates not from the order appointing him, but from the completion of the security required to be given by the order, and accordingly until the appointment has been perfected by certificate, that the security has been completed, a judgment-creditor is not debarred from proceeding to execution.[1]

But if no security is required, which should appear upon the face of the order, the appointment is complete upon possession being taken under the order.[2] When, as will be done in urgent cases, an *interim* receiver is appointed for a limited time without security, he becomes an officer of the Court and is legally clothed with that character from the date of his appointment.[3] The receiver's liability however to account in respect of monies received and expended by him as receiver at once arises

[1] *Edwards* v. *Edwards*, L. R., 2 Ch. D., 291, 296. In *Defries* v. *Creed*, 34 L. J. Ch., 607, it was held that there was no contempt, possession having been taken after the receiver was nominated, but before he had passed his recognisances and before he had been actually appointed, and *see* Ex parte *Evans*; Re *Watkins*, 13 Ch. D., 252, 255; High, § 121. A contrary rule generally prevails in the American Courts in which it is held that upon the filing of the bond the receiver's title has relation back to the date of his appointment, and such title has been upheld against creditors levying upon the property between the date of the appointment and the filing of the bond. High, § 121A, and *see* Beach, § 168.

[2] *Morrison* v. *Skerne Iron Works Co.*, 60 L. T., 588. As to forms of appointment, *see* Seton, 750.

[3] *Taylor* v. *Eckersley*, 2 Ch. D., 302, 5 Ch. D., 741.

whether the security has been completed or not.[1] As far as respects parties to the action the rents and profits of the estate over which a receiver has been appointed are bound from the date of the order for the appointment;[2] but the latter does not date back to the date of the application.[3] Though outsiders may not be affected until the completion of the security, the parties to the suit may, before such time, be restrained from touching the property.[4]

Duration of Receivership

§ 11. Except (according to English practice) in the case of managers, there is often no limit of time fixed.[5] When this is the case and the suit is dismissed, the dismissal of the suit will in general operate as a discharge of the receiver. But if the suit is decreed and no limit is fixed in the appointment of a receiver it is not necessary for the judgment to direct that he be continued.[6] Sometimes the receiver is only appointed until judgment, that is, during the pendency of the suit or until further orders. When this is the case, if he is to continue receiver, the judgment must so direct, and as this is practically a new appointment, further security must be given unless, as is usually the case, the security originally given is made applicable to any continuation of the appointment.[7] A receivership may be continued, although the original reasons for the appointment have been removed, when these causes have produced new ones sufficient to call for an appointment which have not been and cannot be removed.[8]

[1] *Smart* v. *Flood*, 49 L. T., 467.

[2] *Lloyd* v. *Mason*, 2 M. & C., 487; *Codrington* v. *Johnston*, 1 Beav., 520. See *Wickens* v. *Townshend*, 1 R. & M., 361; Re *Birt*, 22 Ch. D., 604.

[3] Re *Clarke*, 1898, 1 Ch., 339.

[4] See *Defries* v. *Creed*, 34 L. J. Ch., 607.

[5] Kerr, 146.

[6] Kerr, 146.

[7] *Ib.*, in *Motivahu* v. *Premvahu*, I. L. R., 16 Bom., 511, 512 (1892), the receiver who had been previously appointed was continued by the decree.

[8] Beach, § 99.

It is within the discretion of a Court appointing a receiver in a suit, to order that the office should continue permanently after the decree when such continuance is necessary or for so long as it may be so. A decree of the High Court declared it to be necessary that a permanent appointment should be made of a receiver and manager of the estate allotted by the Government to the family of the deceased Maharajah of Tanjore, and directed that fresh appointments to the receivership should be made from time to time as occasion might require during the life of the senior widow under whose management the estate had been originally placed and the lives of the co-widows surviving her or for so long as the Court might consider necessary. *Held* that the decree directing the permanent receivership was not in variation of the judgment which it purported to follow, that the Court had a discretion to make such an order when necessary for the preservation of the estate; and that so doing was in accordance with the practice; there being nothing to prevent the Court from giving the management to the senior widow living at the time, if she should be fit, to manage the estate on behalf of all interested in it.[1]

Mode of appointment.

§ 12. A receiver will not be appointed under the Code unless an action is pending or the property be the subject of attachment. A plaint should be filed claiming a receiver, where the obtaining of it is a substantial object of the action, upon or after the filing of the plaint and before or after service of the writ. An application for a receiver may be made on motion or on petition.[2] The party apply-

[1] *Mathusri Umamba Boyi Saiba* v. *Mathusri Dipamba Boyi Saiba*, I. L. R., 19 Mad., 120 (1895), and *see* Ex parte *Jijai Amba*, I. L. R., 13 Mad., 390 (1880).

[2] Under English practice when the application for a receiver is made for the first time in the cause it must be heard in Court: but if the application is only to supply the place of a receiver already appointed, and whose office has become

ing may either move to obtain a rule *nisi* or serve notice of motion. If the matter be urgent he may apply for an *ad interim* receiver until the hearing of the application, or he may apply for leave to serve short notice of motion. Formerly in England a defendant could not apply for a receiver before decree.[1] But by the Judicature Act and rules and orders thereunder an application for a receiver may be made by any party whether plaintiff or defendant.[2] But the defendant's claim to relief must arise out of the plaintiff's cause of action or be incidental to it. So in an action for dissolution of a partnership and for taking the partnership accounts, it was held that the defendant was entitled to give a cross notice of motion in the plaintiff's action for the appointment of a receiver.[3] And in a partition action the defendant was held entitled to move for a receiver for the protection of the property.[4] But if the relief asked by the defendant is not connected with the subject-matter of the plaintiff's claim and relates to nothing that is the issue in the plaintiff's action, but is outside of the action altogether, then the defendant cannot, it has been held, apply without a counter-claim or a new suit.[5] It is submitted that under the Civil Procedure Code the Court possesses the power of appointing a receiver at the instance of the defendant, but that the exercise of such jurisdiction will be limited as abovementioned. And that, if the relief sought by a defendant is not connected with the subject-matter of the plaint, the defendant must, if he desires a receiver, institute an action of his own for such purpose.

vacant by death or otherwise, it may be made in chambers; *Grote* v. *Bing.*, 9 Hare, App. 1, but *see* p. 64, *post.*

[1] *Robinson* v. *Hadley*, 11 Beav., 614.

[2] S. 50, 2, 6.

[3] *Sargeant* v. *Read*, 1 Ch. D., 600.

[4] *Porter* v. *Lopes*, 7 Ch. D., 358.

[5] *Carter* v. *Fly*, 1894, 2 Ch., 541; Kerr, 133.

Application for a receiver may be made either *ex parte* or on notice, but it is only in case of emergency that a receiver will be appointed upon an *ex parte* application as where there is any risk of the defendant defeating the applicant's object by making away with the property on being served with notice of application for a receiver. The Courts, however, are very averse to the exercise of jurisdiction upon applications *ex parte*.[1] The motion should properly be founded on affidavits or papers, copies of which should be served with the notice of the application; although, if the papers on which the moving party seeks relief are already in file in the cause, it is sufficient to refer to them in the notice. It is not regarded as necessary or essential to the appointment of a receiver that the facts upon which the application is based should be set forth in the pleadings, but it is sufficient if they are presented to the Court by affidavit upon the hearing of the motion. This follows necessarily from the very nature of the appointment, which is usually treated as an auxiliary proceeding and not the ultimate object of the action. Affidavits upon which the application is based should be distinct and precise in their allegations, so that the defendant may be fully apprised thereof, especially where fraud is one of the grounds relied upon for the interference of the Court. It is not sufficient to allege merely the legal conclusions upon which the plaintiff relies, and the facts must be averred upon which such conclusions are predicated. Nor will it do to allege in general terms that plaintiff is entitled on principles of equity, but the facts relied upon should specifically appear. The Court will not be moved by vague allegations, nor will mere general averments of plaintiff's belief that the property will be wasted or de-

[1] *Kerr*, 127, 128; High, § 111.

stroyed, warrant the Court in interfering, but the grounds upon which such belief is founded should be set forth.[1] Because a plaintiff makes violent and wholesale charges of waste and malversation and upon this basis applies for a receiver, it is not a necessary consequence that such an appointment should be made ; there must be acceptable evidence.[2] It must be shown that a receiver is necessary for the realization or preservation of the property or for the other objects mentioned in the Code.[3] Affidavits may be received and read in answer to the application, and the Court will then appoint or refuse to appoint a receiver.[4] It is proper on denying a motion for a receiver to give leave to the moving party to renew his motion upon additional proof, if it appears that he may, by obtaining new proof, present a strong case for the relief sought. And it is competent for a plaintiff to ask for and for the Court to appoint a receiver after a hearing and even after a rehearing and refusal, when an altered state of facts is presented showing an appropriate case for the relief. But when the application has once been before the Court and has been denied, a receiver will not be appointed upon a subsequent application upon a simple notice for that purpose, founded upon the same papers as before without affidavits or additional proof showing a necessity for the relief. And this rule holds good even though the Court may have intimated on the former application that a receiver might afterwards be granted if circumstances should warrant the relief. After a receiver has been appointed upon motion, pending an action against defendant, it is proper for the Court to entertain

[1] High, §§ 17, 84, 88, 89; Kerr, 134.

[2] *Prosonomoyi Devi* v. *Beni Madhub Rai*, I. L. R., 5 All., 556 (1883).

[3] *Lataful Hossain* v. *Anant Chowdhry*, I. L. R., 23 Cal., 517 520 (1896).

[4] As to the selection of the person to be appointed, v. *ante*,

an application to open and rehear the motion for the receiver and to allow the defendant to introduce proofs which could not be produced upon the former hearing.[1] When a receiver has been appointed over a particular subject-matter on behalf of one creditor or a class of creditors, the practice is frequently adopted of extending the same receiver for the protection of other parties interested in the same subject-matter, for the purpose of saving the expense of a new appointment; or if appointed over a part only of the defendant's estate he may be extended over the residue for the benefit of other creditors.[2] Where proceedings are already pending, an order for a receiver may be made in those proceedings without any fresh suit being instituted.[3] The appointment is subject to the ordinary rule that equitable relief can only be granted when the proper parties are before the Court.[4] The person whose property it is sought to place in the receiver's hands must be made a party to the suit in order that he may have an opportunity of resisting the application, the granting of which might result in irreparable injury to his interests.[5] An application for the appointment of a receiver on the retirement of another receiver should be made in Court and not in Chambers.[6] Upon making the order the Court either duly appoints a particular person to be receiver or directs a reference to enquire who will be a fit and proper person to be appointed. In the first case if the appointment be without security it takes effect at once; if subject to security it takes effect upon the conclusion of the enquiry as to the security to be taken and the filing of the certificate that security

[1] High, §§ 91, 92.
[2] High, § 93.
[3] Re *Peace and Waller*, 24 Ch. D., 407.
[4] Kerr, 128.
[5] High, § 17.
[6] *Stalkartt* v. *Stalkartt*, I. L. R., 28 Cal., 250 (1900); S. C., 5 C. W. N., CXXXIX.

has been given. If the Court directs an enquiry as to who is to be appointed, the enquiry is held in the High Court by the Registrar. The party requiring a receiver nominates a particular person. An enquiry is made as to his fitness and as to the security. The Registrar then reports the matter to the Court which, on reading the previous order, appoints him subject to his giving the security settled. As to forms of appointment, see *Appendix*.

Security.

§ 13. Every receiver appointed must give such security (if any) as the Court thinks fit duly to account for what he shall receive in respect of the property.[1] As a general rule security is required, but if, as in exceptional cases, no security is to be given, it should be so stated in the order. Where a person is appointed receiver subject to his giving security, the order is not effective until security is given.[2] The security usually required is the bond of the receiver with two or more sureties.[3] The procedure with regard to the giving of security as it prevails in the High Court is as follows:—On an order being made for the appointment of a receiver subject to his giving security to the satisfaction of the Registrar, the order is drawn up and filed in the Registrar's office. An office copy is then obtained and filed in the Reference and Account Department of the Registrar's office. Upon the office copy being filed, the Registrar issues notice to all parties to appear before him on a day to be fixed and to pr ceed under the order. The matter comes on as a reference on the day fixed, and the Registrar proceeds to enquire into the amount of assets likely to come to the hands of the receiver and fixes the amount of security to be furnished. In doing this regard will be had to the nature of the

[1] Civ. Pr. Code, s. 503 (*e*). High, § 121.
[2] Kerr, 138, 139; *In re Roundwood Colliery Co.*, 1897, 1 Ch., 373; [3] Kerr, 139.

property and the periods at which the receiver is to pass his accounts and pay balances due from him and to the amount of the balances which are likely to remain in his hands before payment. Sometimes the amount of the security may be reduced by deposit of securities in the Bank of Bengal endorsed in a non-negotiable form. Security is generally given by bond. The sureties who have been proposed and who must be resident within the jurisdiction are examined, and upon the Registrar being satisfied as to the sufficiency of the sureties a bond is executed by the receiver and his sureties in favour of the Registrar in the form given in the Appendix. On this being done the Registrar then certifies to the Judge that security has been furnished, and thereupon the order for appointment of the receiver takes effect.

If a surety becomes insolvent and dies the receiver will be called upon to furnish fresh security, and a reference is made for that purpose as abovementioned. If the receiver himself becomes insolvent his office terminates. Should it become necessary to enforce the bond it is assigned by the Registrar under order of Court to the party entitled to sue upon it; should the suit be still undetermined at that time the Court would probably appoint a new receiver with power to sue upon the bond assigned to him. As a general rule no fresh security is required when the receiver is continued by the decree, the order generally directing that he be continued upon the same security. In the case of the appointment of the Court Receiver no reference is required as that officer gives security upon his entering office in his own bond and that of his sureties who are approved by the Chief Justice. According to English practice where there is evidence of immediate danger to the property, and there is no time for the receiver to complete his security, an *interim*

receiver may be appointed without security for a limited period, or until a receiver should be appointed under a reference for that purpose upon the undertaking of the person so appointed *interim* receiver, if he be the plaintiff, not to deal with the property except under the direction of the Court and to abide by any order which the Court may think fit to make as to damages or otherwise. In other cases where the case is urgent and there is no time for the receiver to complete his security, the party moving the Court must enter into an undertaking as to damages and for the receipts of the receiver; or must undertake that the person so appointed receiver shall give such security as the Court can enforce that he will preserve intact the property of which he is appointed receiver.[1] Although the author can find no case where this has been done there seems to be no reason why this course should not be followed if necessary. In any case the Court might dispense with security or, in the case of the High Court, appoint the Court Receiver. The Court has, however, where there was great danger to the property, appointed a receiver without security, and directed him to take possession before the order of appointment was formally drawn up.

Appointment cannot be questioned collaterally.

§ 14. The general principle applicable to all judicial proceedings, that the propriety of an order or decree made in a cause in which the Court has jurisdiction, cannot be challenged collaterally, applies with equal force to an order appointing a receiver made by a Court of competent jurisdiction. Thus in an action brought by a receiver for the recovery of property claimed by him by virtue of his receivership, the defendant will not be permitted to question the propriety of his appointment. The appointment of a receiver is not, however, a proceeding *in rem*

[1] Kerr, 143.

in the sense that it is binding upon all the world and persons who are not parties to the action are not concluded thereby. If, however, the Court making the order was without jurisdiction, a different rule prevails, and in such case its order may be held void even when questioned in a collateral suit or proceeding.[1]

Effect of appointment.

§ 15. A receiver duly appointed is from the moment of his appointment an officer of the Court and entitled to the possession of the property comprised in the order appointing him. The effect of the appointment is to remove the parties to the action from the possession of the property,[2] subject to this that the Court cannot remove from the possession or custody of property under attachment any person whom the parties to the suit or some or one of them have or has not a present right so to remove.[3] The appointment, however, though it may operate to change possession has no effect itself upon the title to the property in any way and determines no right as between the parties.[4] Receivers and managers are only the custodians of the property of which they take possession. The Court in an action for a receiver deals with the possession only until the right can be determined, if the right be the subject-matter in dispute between the parties, or until the incumbrances have been cleared off, if the appointment has been made at the suit of an incumbrancer. The title is in no way prejudiced in theory or principle by the appointment,[5] and remains in those in whom it was vested when the appointment was made.[6] The possession of the Court

[1] High, § 39A. See *Poreshnath Mookerjee* v. *Omerto Nauth Mitter*, I. L. R., 17 Cal., 614, 618 (1890).

[2] Kerr, 149, Civ. Pr. Code, s. 503 (*b*).

[3] Civ. Pr. Code, s. 503.

[4] *Orr* v. *Muthia Chetti*, I. L. R., 17 Mad., 504 (1893); Beach, § 1.

[5] Kerr, 149, 152.

[6] Beach, § 209: the object of the appointment is not to divest a rightful owner of the title but to protect the property by taking possession; *ib.*, § 221.

by its receiver is the possession of all parties to the suit according to their titles: his appointment is not for the benefit of the plaintiff merely but for all other persons who may establish rights in the cause. He is not the particular agent of any party but an officer of the Court.[1] With regard to the limitations in his title, it is to be observed that his possession is subject to all valid and existing liens upon the property at the time of his appointment and does not divest a lien previously acquired in good faith.[2] The rights of the parties to an action are not interfered with by the appointment.[3] It is not adverse to either party.[4] If at the time a receiver is appointed a party claiming a right in the same subject-matter under a title paramount to that under which the receiver is appointed is in possession of the right which he claims, the appointment of the receiver leaves him in possession.[5] The appointment of a receiver is a matter which does not concern mortgagees or prior incumbrancers, for a receiver in the exercise of his authority will be obliged to respect former orders of the Court; and prior incumbrancers are at liberty to take such proceedings in behalf of their own interests as they may think fit.[6] It has been held by the New York Court of Appeals that where a receiver of the rents and profits only has been appointed, he does not take any title to the property, although entitled to the possession, and so that a transfer of the legal title, whether by grant or under a foreclosure, is not adverse to his possession and is allowable.[7]

[1] Kerr, 153.

[2] High, § 138; Beach, § 202.

[3] Kerr, 151.

[4] Beach, § 222.

[5] Kerr, 149, 164; *Evelyn* v. *Lewis*, 3 Ha., 472; *Bryant* v. *Bull*, 10 Ch. D., 155.

[6] *Bryant* v. *Bull*, supra; the appointment of a receiver is for the benefit of incumbrancers only so far as expressed to be for their benefit and as they choose to avail themselves of it. Kerr, 153, 154, 156.

[7] *Foster* v. *Townshend*, 2 Abb. N. C., 29, 45 (Amer.); Beach, § 211.

As a general rule, the mere appointment of a receiver to take charge of property in dispute will not suspend the operation of the statute of limitations.[1] Where a receiver has been appointed in execution to collect the rents of a property in satisfaction of a decree, the attachments still continuing, the execution-proceedings continue so long as the appointment of the receiver continues, although the execution case is struck off the file.[2] The appointment operates as an injunction against the parties, their agents and persons claiming under them, restraining them from interfering with the possession of the receiver except by permission of the Court.[3] The order does not, however, "create a charge, but it operates as an injunction to restrain the defendant from himself receiving the proceeds of sale."[4] A receiver of land never takes actual possession; he only receives the rent; nor does he receive such rents and profits by virtue of an estate or title vested in him, but he collects the same merely as an officer of the Court upon the title of some persons parties to the action.[5]

Where a person having obtained a decree for money died before the decree was executed and the administrator of his estate put the decree in execution and then transferred it to a third party who applied to have his name put on the record as decree-holder and to execute the decree, and it was objected that the administrator had no power to make the transfer as the estate was at the time of the transfer vested in a receiver appointed under an order of Court: it was held that if the estate was at the

[1] Beach, §§ 219-220; Kerr, 152.

[2] *Radha Kissori Bose* v. *Aftab Chundra Mahatab*, I. L.R., 7 Cal., 61 (1881).

[3] *Mahomed Zohuruddeen* v. *Mahomed Noorooddeen*, I. L. R., 21 Cal., 91 (1893).

[4] *Tyrrell* v. *Painton* (1895), 1 Q. B., 206.

[5] *Ex parte Evans*, 13 Ch. D., 255; *Vine* v. *Raleigh*, 24 Ch. D., 243.

time of the transfer vested in a receiver duly appointed and the decree appertained to the estate, the administrator had apparently no power to transfer the decree.[1]

Possession and interference with possession of Receiver.

§ 16. The receiver being the officer of the Court from which he derives his appointment, his possession is exclusively the possession of the Court, the property being regarded as in the custody of the law, *in gremio legis* for the benefit of whoever may be ultimately determined to be entitled thereto. The possession being therefore that of the Court may not be disturbed without the leave of the Court, and any person who disturbs such possession is guilty of a contempt and liable to punishment therefor. No one is entitled to interfere with the possession whether he claims under, or paramount to, the right which the receiver was appointed to protect.[2] Thus an attachment of money in the hands of the receiver is an interference with the Court's possession and may not, therefore, be made without the Court's leave first obtained.[3] A judgment-creditor cannot without leave proceed to execute his decree by attachment of property in the hands of a receiver. The Court does not permit and will not recognise attachment of the properties in the hands of its receiver, under process issued without sanction or leave, by inferior courts, the reason being that a proceeding by way of attachment is an interference with the possession of the receiver.[4] Where it was contended that

[1] *Ganga Das Seal* v. *Yakub Ali Dobashi*, I. L. R., 27 Cal., 670, 673 (1899).

[2] High., § 131; Kerr, 158-160; *Kahn* v. *Ali Mahomed Haji Umer*, I. L. R., 16 Bom., 577, 579 (1892).

[3] *Kahn* v. *Ali Mahomed Haji Umer*, I.L.R., 16 Bom., 577 (1892); followed in *Mahomed Zohuruddeen* v. *Mahomed Nooroodeen*, I, L. R., 21 Cal., 85 (1893).

[4] *Jogendra Nath Gossain* v. *Debendro Nath Gossain*, I. L. R., 26 Cal., 127, 129 (1898); *Hem Chunder Chunder* v. *Pran Kristo Chunder*, I. L. R., 1 Cal., 403 (1876); *Kahn* v. *Ali Mahomed Haji Umer*, I. L. R., 16 Bom., 577 (1892); *Mahomed Zohuruddeen* v. *Mahomed Nooroodeen*, I. L. R., 21 Cal., 85 (1893).

under the terms of section 272 of the Code an attachment is authorised to be made by a notice to the Court in whose custody the property attached was or to the public officer having the custody of the property proposed to be attached, and that a receiver would be in no better position than the Court itself of which he is an officer ; it was held that this argument overlooked an important distinction between the case of property which is in the custody of the Court and that of property in the custody of a receiver appointed by the Court: that the appointment of a receiver operates as an injunction against the parties, their agents and persons claiming under them restraining them from interfering with the possession of the receiver except by permission of the Court ; that section 272 was not intended to and did not in fact alter the practice of the Court which is to require that persons attaching property in the hands of the receiver should previously obtain the permission and sanction of this Court and to regard an attachment not so authorised as a breach of the injunction and therefore a contempt of Court.[1] By a decree of the High Court obtained by D. M. in November 1871 in a suit on a mortgage brought by him, against B. C. and P. C., it was ordered that the suit should be dismissed against P. C., that the amount found due on the mortgage should be paid to D. M. by B. C., that the mortgaged property, some of which was in Calcutta and some in the Mofussil, should be sold in default of payment, and any deficiency should be made good by B. C. The property in Calcutta was sold under the decree, and did not realize sufficient to satisfy the decree. D. M. thereupon, in August 1873, obtained an order for the transfer of the decree to the Mofussil Court for execution : after the trans-

[1] *Mahomed Zohuruddeen* v. *Mahomed Noorooddeen*, I. L. R., 21 Cal., 85, 91 (1893).

fer B. C. died in December 1874, leaving a widow and an adopted son, his representatives, against whom the suit was revived. The decree, however, was returned to the High Court unexecuted. In a suit for partition of the estate of R. C., deceased, brought by P. C. against B. C., in the High Court, a decree was made in February 1871, for an injunction to restrain B. C. from intermeddling with the estate or the accumulations, and for the appointment of the receiver of the Court as receiver, to whom all parties were to give up quiet possession. B. C. was in that suit declared entitled to a moiety of the property in suit. *Held*, on application by D. M. to the High Court for an order that the receiver should sell the right, title and interest of the widow and son of B. C. in the estate in his hands to satisfy the balance of his debt, that property in the hands of the receiver of the High Court cannot be proceeded against by attachment in the Mofussil; and that D. M. was entitled to an order that their interest should be attached in the hands of the receiver, and that the receiver should proceed to sell the same.[1]

Prior to the Transfer of Property Act a judgment-creditor, if he had proceeded to execute his decree in the Mofussil Court, could have done so only by attachment and sale. Under that Act no attachment is necessary, and the reason for the course adopted in the last-mentioned suit does not now exist as was held in the undermentioned case[2] in which the facts were as follows :—In this case a receiver had been appointed in a partition-suit in which a decree had been made declaring the rights of the parties and directing the usual accounts and enquiries. During

[1] *Hem Chunder Chunder* v. *Pran Kristo Chunder*, I. L. R., 1 Cal., 403 (1876).

[2] *Jogendra Nath Gossain* v. *Debendra Nath Gossain*, I. L. R., 26 Cal., 127 (1898), S. C., 3 C. W. N., 90.

the partition-proceedings and after the appointment of the receiver two of the co-sharers mortgaged their interest in the undivided properties. The mortgagee obtained a decree on his mortgage and sought to bring to sale certain properties which were included in his mortgage, but which were then in the hands of the receiver. A rule was obtained by the judgment-debtors calling on the judgment-creditor to show cause why he should not be restrained from proceeding to a sale of the properties in the hands of the receiver on the ground that to sell the mortgaged properties without the leave or sanction of the Court would amount to contempt of Court. It was, however, held that the sale of the properties under the provisions of the Transfer of Property Act could have no other effect, so far as the possession or control of the receiver was concerned, than a private sale by the mortgagors themselves. To obtain the benefits of his purchase and the rights incident thereto the purchaser would have to seek the intervention of the Court appointing the receiver and would be bound by all the proceedings in the partition-suit in such Court. The rule was therefore discharged.[1] When a fund, such as the assets of a partnership, is in the hands of the Court through its officer, the receiver, one out of the whole body of creditors against the fund will not be allowed to gain priority over the remainder by the expedient of attaching the moneys in the hands of the receiver. Such an attachment is an interference with the Court's possession through its officer, the receiver, and may not therefore be made without the Court's leave first obtained : which leave will not be granted except on such terms as will ensure equality between the creditors.[2] Provided that the order

[1] *Jogendra Nath Gossain* v. *Debendra Nath Gossain*, I. L. R., 26 Cal., 127 (1898).

[2] *Kahn* v. *Ali Mahomed Haji Umer*, I. L. R., 16 Bom., 577 (1892).

of appointment be a subsisting one it is immaterial, that is, improper or erroneous. The only course open to those aggrieved by the order is to take the proper course to question its validity, but while it subsists it must be obeyed. The rule is not confined to property in the hands of a receiver, for the Court will not permit any one without its sanction and authority to intercept or prevent payment to the receiver of any property which he has been appointed to receive, although it may not be actually in his hands.[1] It is immaterial whether the interference is done by the consent or permission of the receiver or by compulsory process against him.[2] In order, however, to constitute a disturbance it is necessary as already stated so far at least as third parties are concerned, that the appointment of the receiver should have been perfected and the receiver actually in possession.[3]

Though the Court can appoint receivers over property out of the jurisdiction, the receiver is not put in possession of foreign property by the mere order of the Court; something else has to be done, and until what is necessary has been done in accordance with foreign law, any person, not a party to the suit, who takes proceedings in a foreign country is not guilty of contempt either on the ground of interfering with the receiver's possession or otherwise, and for this purpose no distinction can be drawn between a foreigner and a British subject.[4]

[1] Kerr, 158—160; If the order is wrong, the Court, by which it is made should be applied to set it right. *Searle* v. *Chout*, 25 Ch. D., 724.

[2] *DeWinton* v. *Mayor of Brecon*, 28 Beav., 200, 202.

[3] Kerr, 162; v. *ante*; it does not appear in the cases cited whether the parties interfering had knowledge of the order. *Qu.* where a third party has such knowledge and interferes to violate it before its completion; *see* High., § 166; Beach, § 245; *Hull* v. *Thomas*, 3 Edw. Ch., 236; *Skip* v. *Harwood*, 3 Atk., 564; and *see* the same doctrine discussed as to injunctions in *McNeil* v. *Garratt*, Cr. & Ph., 98.

[4] In re *Maudslay, Sons and Field*; *Maudslay* v. *Maudslay, Sons and Field*, L. R., 1 Ch. (1900), 602.

In this case the Court observed : "It is not altogether easy to ascertain the origin, nature, and extent of the powers of a receiver. A receiver is an officer of the Court, and the Court does not allow the possession of its officer to be interfered with without its leave. When the Court appoints a receiver it requires the parties to the action to give up possession to the receiver of all property comprised in the order, and treats them as guilty of contempt if they refuse to do so. The Court will grant a receiver a writ of possession (Order XLVII, r. 2), or a writ of assistance (*Wyman* v. *Knight*[1]) to enable him to recover possession, and it will order tenants to attorn to the receiver. So long as the property is within the territorial jurisdiction of the Court, there is no difficulty, at least in theory, in putting the receiver in actual possession. And when the receiver is in possession the Court does not allow his possession to be interfered with without leave. For example, no judgment-creditor of the company would be allowed to levy execution upon the property of the company in England now in the possession of the receivers. It is well settled that the Court can appoint receivers over property out of the jurisdiction. This power, I apprehend, is based upon the doctrine that the Court acts *in personam*. The Court does not, and cannot, attempt by its order to put its own officer in possession of foreign property, but it treats as guilty of contempt any party to the action in which the order is made, who prevents the necessary steps being taken to enable its officer to take possession according to the laws of the foreign country. See *Keys* v. *Keys*,[2] where special directions were given to a receiver as to the best mode of getting in an Indian debt, and *Smith* v.

[1] (1888), 39 Ch. D., 165.

[2] (1839), 1 Beav., 425.

Smith,[1] where it was pointed out that a receiver of property in Jersey and in France would have to recover possession according to the laws of those countries ; and in *Houlditch* v. *Marquis of Donegal*[2] the House of Lords held that the Court of Chancery in Ireland ought to appoint a receiver in a suit instituted to carry into effect a decree of the Court of Chancery in England by which a receiver had been appointed over estates in Ireland. In other words, the receiver is not put in possession of foreign property by the mere order of the Court. Something else has to be done, and until that has been done in accordance with the foreign law, any person, not a party to the suit, who takes proceedings in the foreign country is not guilty of a contempt either on the ground of interfering with the receiver's possession or otherwise. For this purpose no distinction can be drawn between a foreigner and a British subject. I have not been able to find any authority in which this precise point has been discussed ; but on general principles, I think, I should not be justified in holding that the claimants by taking proceedings in Paris were in any way guilty of a contempt of Court. If, however, I am wrong in this view, and there has been a contempt, it seems to me that I ought to allow the claimants to proceed, notwithstanding the appointment of a receiver. It cannot be reasonable that I should deprive English creditors of a right against French assets which French creditors undoubtedly enjoy."[3]

But while the order does not affect third parties until the appointment is completed and perfected, where a defendant was present in Court during the hearing of a cause and knew that an order granting a receiver of

[1] (1853), 10 Hare, App. lxxi.
[2] (1834), 8 Bli. (N. S.), 301, 37 R. R., 181.
[3] In re *Maudslay, Sons and Field ; Maudslay* v. *Maudslay, Sons and Field*, 1 Ch. (1900), 602.

his estates had been allowed, although the decree itself had not been drawn up, he was held guilty of contempt by removing a portion of the property and so putting it beyond the receiver's possession for the purpose of evading the decree, and it was held that he could not justify himself upon the ground that the decree had not yet been entered.[1] Nextly, it is necessary that the order states so distinctly on the face of it, over what property the receiver is appointed, that it may be known what is the property that he is in possession of.[2] It is not, however, necessary that the party complained of should be about to turn the receiver out of possession ; he will not be allowed to take the first steps in an action of ejectment without leave.[3] Where the estate over which the receiver has been appointed has determined, possession may be taken without application to the Court. So where a receiver has been appointed over the estate of a tenant for life, the remainderman has a right, immediately on the death of the tenant for life, to go into possession without making any application to the Court.[4]

As a general rule, the appointment of more than one receiver whether by the same or a different Court, except in case of joint receivers, is not allowable. Two receivers cannot both have separate titles to, and possession of, the same property, each being appointed in a distinct and independent proceeding and both having by the terms of their appointment, entire control over the assets of the defendant. In case of such conflicting appointments, the Courts will enquire into and determine upon the priority

[1] *Skip* v. *Harwood*, 3 Atk., 564; Lord Hardwicke saying, "there are several instances of this kind, or otherwise it would be extremely easy to elude decrees, some of which in their nature require a considerable length of time before they can be completely drawn up.

[2] *Crow* v. *Wood*, 13 Beav., 271; Kerr, 162.

[3] Kerr, 163.

[4] Kerr, 171.

of appointment and, if necessary, will take into consideration fractions of a day. The question which of the several receivers first obtains actual possession of the assets will not enter into the determination of the matter. Where the decision of the Court is in favour of the receiver first appointed, it will order the second one to surrender to him the assets of which he may have obtained possession.[1] Where a receiver has been appointed without prejudice to the rights of any prior incumbrancer, and a prior incumbrancer has taken possession, he may enforce his rights whatever they are without being guilty of contempt.[2] It has been already observed that even those claiming paramount to the right which the receiver was appointed to protect must obtain the leave of the Court to enforce that right. If at the time a receiver is appointed a party claiming a right in the same subject-matter *is in possession* of the right which he claims, the appointment of the receiver leaves him in possession of the right and does not interfere with the exercise of it.[3] If, on the other hand, the claimant is *out of possession*, he must apply to the Court before he institutes any legal proceedings affecting the possession which the receiver has acquired,[4] even where the receiver has been appointed without prejudice to the rights of persons having prior charges.[5] So, too, where a receiver has been appointed over the estate of a tenant in possession, though the appointment does not affect the

[1] Beach, § 232; *Searle* v. *Chout*, 25 Ch. D., 724. "It is quite clear that I cannot appoint two receivers to be appointed to the same property," *per* Bacon, V. C.; as to the Court's exercise of its powers in respect of contempt in such cases *see* High, § 173; and see *Ward* v. *Swift*, 6 Ha., 312; *Ex parte Cochrane*, 20 Eq., 282.

[2] *Underhay* v. *Read*, 20 Q. B. D., 209.

[3] *Evelyn* v. *Lewis*, 3 Ha., 472; *Wells* v. *Kelpin*, 18 Eq., 298; *Underhay* v. *Read*, 20 Q. B. D., 209; Kerr, 164.

[4] *Evelyn* v. *Lewis*, supra, 475; Kerr, 164, 159.

[5] *Bryan* v. *Cormick*, 1 Cox, 422; *Langton* v. *Langton*, 7 D. M. & G., 30; Kerr, 165.

rights of the landlord, the latter will not be permitted to exercise those rights, as, for example, the right of distraint, without first obtaining the leave of the Court.[1]

Parties whose rights are interfered with by having a receiver put in their way may, on making a proper application to the Court, obtain all that they may justly require. The Court has the power and will always take care to give a party who applies in a regular manner for the protection of his rights, the means of obtaining justice, and will even assist him in asserting that right and having the benefit of it. Thus where a receiver has been appointed in a partnership-action a creditor who is in a position to levy execution against the assets of the firm may apply to the Court for leave to do so, notwithstanding the appointment of a receiver, and on such application either leave will be given or an order will be made directing the receiver to pay so as to avoid a sale by the Sheriff.[2]

The course of a party who claims a right paramount to that of the receiver, or rather to that of the party obtaining the receiver, is either to apply on notice in the action in which the receiver was appointed and to come in and be examined *pro interesse suo*, or to apply for leave to proceed by action notwithstanding the receiver's possession.[3] The

[1] *Sutton* v. *Rees*, 9 Jur. N. S., 456; Kerr, 165: *see* also as to distraint, *ib.*, 168, 169.

[2] Kerr, 165, 166.

[3] Kerr, 166: as to form of notice of motion or summons for examination *pro interesse suo* see Dan. Ch. Forms 1698. With respect to the practice on examinations *pro interesse suo* see *Brooks* v. *Great head*, 1 J. & W., 179; *Hamlyn* v. *Lee*, 1 Dick., 94; *Gomme* v. *West*, 2 Dick., 472; *Hunt* v. *Prist*, ib., 540; *Anon*, 6 Ves., 287. The effect of such an examination may generally be obtained on motion or petition when a reference to enquire into the claim will, if requisite, be ordered. *Walker* v. *Bell*, 2 Mad., 21; *Dixon* v. *Smith*, 1 Swan., 457; *Dickinson* v. *Smith*, 4 Mad., 177: Dan. Ch. Pr., 921, 1696. *Bissessuree Debia* v. *Sookram Das Mohunt*, 15 W. R., 347 (1871), appears to have been a case of this kind: but the report is so meagre that it is not clear why the application was refused.

application in the suit is usually framed in the alternative that the receiver do accede to the plaintiff's demand or that the latter may be allowed to proceed.[1] In most instances a party aggrieved may have ample relief by application on motion to the Court appointing the receiver. In most cases of claims against a receiver the remedy by motion is adequate, and any person having such a claim may resort to this summary remedy. The more common practice and that which has been generally commended by the Courts is to hear and determine all rights of action and demands against a receiver by petition in the cause in which he was appointed without remitting the parties to a new and independent suit. And it rests wholly within the discretion of the Court to grant leave to bring an independent action against its receiver, or to determine the controversy upon petition in the original cause. And it is proper for the Court when application is made for leave to sue its receiver to investigate the subject-matter of the petition, and if it appears that the case is free from difficulty, or that it involves no question which must necessarily be determined by an action-at-law the Court may itself determine the matter on petition.[2] If the Court on examining the title is satisfied that the right of the claimant is clear, it will at once decide the matter in his favour, without directing an enquiry, or it may direct an enquiry, or give the claimant leave to sue.[3] In other cases of contest and complexity and if there is a doubtful question and the question to be tried is a pure matter of title, the Court will give the claimant leave to sue, taking care, however, to protect the possession by giving proper directions.[4] In

[1] Kerr, 167.
[2] High., §§ 254, 254, B.
[3] Kerr, 168, and *v.* ante.
[4] *Empringham* v. *Shortt*, 3 Ha., 470; Kerr, 170.

this country the remedy by suit is as often, if not more, frequently employed than the other, but wherever relief may be obtained by application in the suit in which the receiver was appointed, an independent action should not be brought.[1]

The undermentioned suit, was a case in which persons, not parties to a suit in which a receiver had been appointed, were permitted to apply, by motion on notice in the suit for the purpose of establishing their rights to obtain an order directing the receiver to make over to them certain properties of which he was holding possession after expiry of the lease under which those properties had been held by him, and which had been granted to his predecessor in title by certain persons through whom the applicants claimed as representatives.[2]

Mahomed Mehdi Galistana v. *Zoharra Begum.*

This was appeal from an order made in the Original Civil jurisdiction of the High Court. The suit, in which the order referred to was made, was an administration-suit brought by a daughter to administer her father's estate; in such suit, in the year 1881, the receiver of the Court was appointed receiver, and as such, he took possession of certain taluks and zemindaries situate in or about Purneah, more than half of which were alleged to have belonged to the father, Mahomed Tuckee, whilst the remainder was formerly held by Mahomed Tuckee in the name of his son under a lease from certain Persian zemindars, which ran from the year 1865 to the year 1885. The rents of this portion of the property so held under lease were duly collected by the said receiver, and credited to the estate, he paying to

[1] *Searle* v. *Choat*, 25 Ch. D., 723.

[2] *Mahomed Mehdi Galistana* v. *Zoharra Begum*, I. L. R., 27 Cal., 285 (1889); *Neate* v. *Pink*, 15 Sim., 450, as explained by Fry, J., in *Brocklebank* v. *East London Railway Company*, L. R., 12 Ch. D., 839, referred to.

certain persons who claimed to be the heirs of the Persian zemindars the yearly rental thereof until the expiry of the said lease, at which period the original lessors or their representatives became entitled to possession of the land formerly held under lease. In December 1887, two persons, named Mirza Mahomed Moosavee and Hadjee Mirza Mahomed Ali Savjee, produced to the said receiver a power-of-attorney, alleged to have been executed in their favour by the original lessors or their representatives, authorizing the donees of the power to take over possession of the properties formerly held by the receiver under the said lease. This power, and another similarly presented, were both found by the receiver to be insufficient for the purpose, and subsequently, in October 1887, a further power was obtained by the two persons aforesaid, and a fresh application was made to the said receiver for possession of the said lands. The receiver, however, declined to make over possession until the applicants proved, to the satisfaction of the Court, the fact that the donees of the power-of-attorney were either the original lessors or their representatives in interest, and until the Court should make an order directing him so to make over possession. Mirza Mahomed Moosavee and Hadjee Mirza Mahomed Ali Savjee (hereafter called the applicants) thereupon applied to the Court, on notice in the administration-suit abovementioned, for an order that the receiver should deliver possession to the applicants of the said lands together with all papers, &c., connected therewith, and should pay to the said applicants all rents and profits of the said lands, less collection charges, accruing since the year 1885. This application was supported by affidavit setting out the various devolutions and transfers of title from the original grantors of the said lease to

the donees of the said power-of-attorney. The application was opposed by one Nathmal Golecha (who was the purchaser of the interests of all the parties to the suit other than those of the infant defendants), and certain of the infant defendants who had not parted with their shares in the estate in the hands of the receiver. Mr. Justice Norris dismissed the application, on the ground that the applicants were not parties to the administration-suit, and that the Court had no jurisdiction in the matter. The applicants appealed.

The Appeal Court (Pigot, J.) observed as follows :— 'We think the case of *Neate* v. *Pink*,[1] as it stands and as explained by Mr. Justice Fry in the case of *Brocklebank* v. *East London Railway Company*,[2] shows that it is proper for, and perhaps absolutely incumbent on, this Court to make an order for an enquiry in these proceedings. It is not necessary for us to dwell upon the principle enforced in those two cases. It is clear that *whatever is the least expensive course, consistent with a satisfactory enquiry, ought to be adopted,* in order that the Court shall not, by its own dominant power, hold property on which the parties to the suit have no claim, and hold it in despite of the real owners. If the Court can find out who the real owners are, it should do so, and in the least expensive manner. Mr. Justice Norris' order must be set aside, and in its place we order an enquiry to be held as to the rights of the applicants or such other persons as may be entitled by assignment or inheritance to the interest of the lessors (naming them) under the lease under which Mahomed Tuckee had a share in the property in question. This enquiry will be held by the Judge on the Original

[1] 15 Sim., 450. [2] L. R. 12 Ch. D. 839.

Side himself, or by such officer as he may send it to, and in such manner as he may direct."[1]

It has been held in the case referred to by the last decision that a person who is not a party to the action is not entitled to apply by motion for payment of money to him by a receiver appointed in the action, even though his claim is made in respect of a debt properly payable out of the funds in the receiver's hands.[2] But in this case the applicants were held to have no specific right in the funds in Court, and it was held that their claim was not against the receiver in any proper sense, but against the Company over whose property the receiver was appointed in respect of a judgment which had been recovered against them subsequent to the appointment of the receiver.

Suits and applications against Receiver.

§ 17. It would be inconsistent with the main purpose of a receivership—to preserve property in controversy *pendente lite*—which devolves upon the Court the duty of protecting its possession, as well as incompatible with the dignity and authority of the Court, to allow its officer to be summoned before any tribunal in respect to the property in his hands, at the will of any and every person who has, or imagines he has, a just cause of action, or who, for sinister purposes, might institute a fictitious suit against him. On the other hand, to deny to those having just causes of action or claims which call for the adjudication of Courts of law or equity, all opportunity for investigation and all right to a proper remedy, simply because the property to which they must look for reparation, has been seized by the Court and is in its keeping, would violate the fundamental principles of personal rights. The difficulty thus presented has been overcome

[1] *Mahomed Mehdi Galistana* v. *Zoharra Begum*, I. L. R., 17 Cal., 285, 287, 288 (1889).

[2] *Brocklebank* v. *East London Railway Co.*, 12 Ch. D., 839.

by requiring all those who desire to bring suit against a receiver first to obtain leave to do so from the Court which appointed him. The Courts usually grant such leave unless it appears clearly from the application of the claimant that his demand has no legal foundation ; the petition should, therefore, show a probable cause of action —one demanding adjudication by proceedings in Court.[1] If a receiver, duly appointed and in possession of the property in controversy, be sued without the leave of the Court appointing him first obtained, the parties who bring the suit may be subjected to proceedings in contempt of Court and punished accordingly. The proceedings in a suit so brought will generally be restrained by injunction, or stayed or set aside on motion. Whether the party proceeding at law did or did not know that a receiver has been appointed over the property or however clear his right may be, the Court will restrain the prosecution of the claim if it be instituted without leave.[2]

It rests in the discretion of the Court to allow a party claiming rights against its receiver, to bring an independent action against him, or to compel such party to proceed against him by petition in the action in which he is receiver.[3] When a Court is asked to

[1] Beach, s. 652 ; *Miller* v. *Ram Ranjan Chakravarti*, I. L. R., 10 Cal., 1014 [a receiver cannot be sued except with the permission of the Court] ; Kerr, 170. It is not the course of the Court unless it is perfectly clear that there is no foundation for the claim to refuse liberty in any case to try a right which is claimed against its receiver. *Randfield* v. *Randfield*, 3 De G. F. & J., 766 : but the applicant should show a probable ground of recovery. High., § 254.

[2] Beach, s. 653 ; Kerr, 158, 172.

[3] Beach, §§ 654, 709 ; High., §§ 254, 254 B, 255 ; it is common practice instead of asking leave to bring action to intervene in the original suit by petition, and some cases are more conveniently so tried than by separate action. Beach, § 654. In the suit of *Suttya Sunkur Ghosal* v. *Rani Golap Money Dossee*, an application was made (3 Sept. 1900, Cor. Ameer Ali, J.) for an order that the receiver who had put up property of the parties for lease and who had subsequently refused to grant

give leave to sue its receiver it may, and usually must, examine into the merits of the claim to ascertain whether a suit is necessary or proper for its adjudication, but such examination and the order made upon it cannot be used by either party as in any way affecting the merits of the case. The order simply permits a judicial investigation to be made; the examination is not itself a trial, nor is the decision an adjudication upon the merits.[1] While the Courts which hold property by their officers, the receivers, are in general zealous in protecting them from unauthorized suits, they will not shield them against actions for property of which they are not authorized or directed to take possession by the decree of the Court.[2] As the granting of leave to sue a receiver is practically only the permission of the Court that claims against him may be investigated and determined by legal methods in a competent tribunal, and as such permission does not affect the right of the claimant in proper cases, to join as defendants, the owner of the property in his keeping, or other parties, it follows that notice of the application for leave to sue a receiver need not necessarily be given to the parties in the original suit, but that notice to the receiver is sufficient to enable the Court to make a valid order. Accordingly it has been held that an order granting leave to sue was sufficient when made upon notice to the receiver alone.[3]

a lease to the highest bidder should grant a lease to the applicant or return his deposit money or be discharged as to $\frac{1}{15}$th share of applicant. In the affidavits filed against the application objection was taken that the matter was properly one for a suit, but the objection was not pressed at the hearing, and the Court disposed of the application.

[1] Beach, § 657.

[2] *Ib.*, § 660: thus if the receiver is a mere trespasser he may be sued notwithstanding permission was not first obtained. *In re Young*, 7 Fed. Rep., 855 (Amer.).

[3] Beach, § 662.

Generally a receiver cannot be held personally liable in actions brought against him in his official capacity, the judgment being entered only so as to affect the funds in his hands.[1] An action cannot be brought against a receiver by a person at whose instance he was appointed.[2] If a special case be made out, the Court will allow a party to continue an action, notwithstanding that it has been commenced without leave.[3]

It has been held in England that an acknowledgment by a receiver will renew the period of limitation if he may, under the circumstances of the case, be treated as the agent of the debtor.[4] In the undermentioned case the plaintiff sued to recover money due upon an adjustment of account. A. and B. had been appointed joint receivers of the estate of the defendants, and while such receivers had entered into the loan transactions the subject-matter of the adjustment. One of the receivers only adjusted and signed the account. The suit would have been barred but for this adjustment. It was contended by the defendants referring to sections 19, 21 of the Limitation Act that one receiver could not acknowledge and had no authority to adjust the account: that where a joint power was given, it must be exercised jointly and that both receivers had taken possession and managed jointly and both had borrowed. It was, however, held that section 21 had no application; that a manager of a business appointed by the Court stood on a different footing

[1] Beach, §§ 715, 718.

[2] Kerr, 160—161.

[3] Kerr, 167: *Gower* v. *Bennett*, 9 L. T., 310: see *Aston* v. *Heron*, 2 M. & K., 397. If an action has been brought or the possession interfered with without leave, the order restraining these acts will also give leave or direct that the party be examined *pro interesse suo*; *Johnes* v. *Claughton*, Jac., 573; as to whether leave to sue is urisdictional; see High., § 254 A.

[4] *Toft* v. *Stephenson*, 1 De G. M. & G., 28, 41. Mitra's Limitation, 3rd Ed., 302: as to part payment see *Lelley* v. *Ford*, 3 C. W. N., cclxxxii (1899); but *see* also Beach, § 220; *Whitely* v. *Lowe*, 2 DeG. & J., 704; affirming S. C., 25 Beav., 421.

from joint contractors referred to in section 21 and that the acknowledgment was binding.[1]

Semble. That for a suit upon promissory notes and an equitable mortgage made by the executors of a deceased person whose estate (including the property subject to mortgage) was subsequently placed in the hands of a receiver, leave is not necessary. It might be urged that though the suit was not brought directly against the receiver, leave was necessary as the suit was against parties over whose property a receiver had been appointed, such receiver being in possession of the mortgaged premises. But it is submitted and the Court appeared to be of such opinion that leave was unnecessary. Since the receiver's possession would not be affected until a decree for sale was made and the purchaser took possession which might never occur, for the executors might discharge the debt out of other assets in their hands. If, however, a decree for sale was made, an application might subsequently be made for leave to take possession.[2]

An application for leave to sue a receiver may be made *ex parte* at the time of presenting the plaint and not in the suit in which the receiver has been appointed or on notice to the parties ;[3] though it would appear that the latter course of applying in the suit has sometimes been followed.[4] Any order declaring that leave to sue is not necessary will not bind the parties who are not present.[5]

[1] *Megraj* v. *Rungo Lall Lohea*, Suit 304 of 1896, Cal. H. C. Cor., Sale, J., 23rd March 1900, as to this case it may be observed that there may be cases where s. 21 would not apply as where the contract had been made by the party previous to the appointment of the receiver, but in this case the receivers were themselves the contractors.

[2] *Chartered Bank of India, Australia and China* v. *Hurish Chunder Neogy*, 5 C. W. N., XV (1900).

[3] *Ib.*

[4] See *Kumar Suttya Suttya Ghosal* v. *Rani Golapmoni Dabi*, 5 C. W. N., 27 (1897).

[5] *Chartered Bank of India, Australia and China* v. *Hurish Chunder Neogy*, supra.

In the undermentioned case it was apparently held that the receiver was not a necessary party to a suit for possession of immovable property.[1] This was an application by one Srinath Biswas and others for leave to sue the receiver. The petition stated that the petitioners were the absolute owners and had been in possession as *howladars* of a piece of land known as *Kismut* Samantogati in the District of Khulna; that some time ago that land had diluviated and formed as accretion to a piece of *chur* land known as Churdukutia belonging to the Government, that under a settlement from the Government the receiver appointed in the above suit had been holding the said reformed land and was in possession of the same. The petitioners then stated that they were desirous of bringing a suit in the Court of the Sub-Judge at Khulna against the parties who were in possession of the said land as also against the receiver for recovery of possession of the land as reformation on its own original site, and they prayed for leave to bring a suit against the receiver appointed in the above suit. The Court refused the application, being of opinion that the receiver appointed in the suit was not a necessary party to the suit to be instituted in the Court of the Subordinate Judge at Khulna, but acceded to an application by the petitioners that the expression of the Court's opinion might be embodied in the order dismissing the application so that the plaint might not be rejected by the lower Court. In a note to this case it is stated that it was followed in the case of *S. M. Sarala Dassi v. Bhuban Mohun Neogi* (Suits Nos. 175 and 206 of 1899) before Sale, J., on the 18th August 1897, when his Lordship in

[1] *Kumar Suttya Suttya Ghosal v. Rani Golapmoni Dabi*, 5 C. W. N., 27 (1897); the case is very briefly reported and no grounds of decision are stated.

dismissing the application for leave to sue the receiver, observed: "If there is any question between the parties entitled to property in the hands of a receiver, a decree in a suit between the parties can always be carried out against such property or any share therein without making the receiver a party to the suit."

When the Court orders a receiver to enter into a contract the contract is made with the Court, the approval by the Judge of the offer made by the third party constituting the contract. Such party may apply on summons that the contract may be given effect to. It is not necessary that in order to enforce his right, he should institute a suit. A Court has complete power to enforce summarily a contract made by it when managing or administering an estate, whatever that contract may be. Such power of enforcing subsisting contracts made by it is not affected by the fact that the Court has ceased to manage the estate before such contract is carried out by reason of the dismissal of the suit.[1]

Surendro Keshub Roy v. *Doorgasoondery Dossee.*

This suit was brought in 1884 for the purpose of establishing the plaintiff's right to a share of the property left by the late Rajah Bejoy Keshav Roy. At an early date in the suit the Court Receiver was appointed receiver of the property, the subject-matter of the suit. On the 15th August 1885, a decree was made in favour of the plaintiff. On the 16th September 1886, the Court made an order, the effect of which was much discussed at the hearing of the application. That order provided that the receiver should be at liberty to accept the offer made by Baboo Sarodapersaud Soor for a lease to him of all the properties appertaining to the said estate with certain exceptions for a term of five years

[1] *Surendro Keshub Roy* v. *Doorgasoondery Dossee*, I. L. R., 15 Cal., 253 (1888).

from the date of Pooneah in the month Assur 1293, at the annual rental of Rs. 75,000. It was further ordered by the same order that all necessary parties as the Registrar of the Court should direct do join in the lease, and it was further ordered that the Registrar do approve of the lease and execute the same for and in the name of the plaintiff and the infant defendant, and cause the same to be registered ; and it was further ordered that the Registrar do also execute the lease for and in the name of the defendant Ranee Doorgasoondery Dossee in the event of her not executing the same on the same being duly tendered to her for that purpose. Sarodapersaud's offer was accepted by the receiver and acted upon by both parties on the 18th September 1886. Sarodapersaud Soor deposited with the receiver Government Securities of the nominal value of Rs. 20,000 as security for his due performance of the covenants of the *izarah*, and on the same date paid the receiver the sum of Rs. 20,000 on account of the *izarah* rent for the then current Bengali year 1293, and the receiver thereupon granted to him *amulnamahs*, the effect of which was to put him in possession of the property. Although the proposed lessee obtained possession and the receiver obtained rent from him, no lease had yet been executed.

The Court observed as follows :—

" I am satisfied from the correspondence that the delay has not been caused by any default on the part of Sarodapersaud Soor. On the other hand, I do not think that there has been any wilful default on the part of any of the parties to the suit. On the 27th April 1887, a decree was made by the Appeal Court dismissing the suit. The result of such decree is that the defendant Ranee Doorgasoondery is declared entitled to the property of her late husband. This summons was taken out on the 9th of January

1888, by Sarodapersaud Soor ; it requires the defendant Doorgasoondery Dossee to shew cause why the *izarah* should not be completed, and the draft submitted to the Registrar for approval, and also why the Government Securities for Rs. 20,000 deposited with the receiver as part security for the performance of the covenants of the *izarah* should not be retained by the receiver pending the settlement of the *izarah* and the execution thereof by the Ranee, or, in the alternative, why they should not be made over to the Bank of Bengal for safe custody pending the completion of the *izarah*, and to shew cause why such securities should not thereafter remain in the custody of the receiver or of the Bank, as the case might be, during the term of the *izarah* to be dealt with only subject to the order of the Court.

" With respect to the execution of the *izarah* there are three questions for me to determine :—

1. Will the Court entertain an application by a proposed lessee with whom a contract for a lease has been made for the execution of a lease, or is it necessary that in order to enforce his right he should bring a suit for specific performance ?

2. Supposing such application to be possible when a suit is pending, does the dismissal of the suit prevent such an application ?

3. Are the circumstances of this case such as to justify the Court in refusing an order for the execution of the lease ?

" I do not think that there can be any real doubt as to the determination of the first question.

" The Court in managing property pending suit, and in managing property which is being administered by the Court, has occasionally to sanction leases, and to require the execution of such leases. Summary orders are made

in England for the execution of leases not only by the parties to the suit, but also by the lessee, and I find that that in a case cited at page 1063 of Daniell's Chancery Practice—*Crane* v. *Brancker*,[1] an enquiry was directed as to the damages which a lessee who had repudiated his contract should pay. On reference to the report of that case I find that the lessee happened to be a party to the suit, but this circumstance I do not think makes any difference. In that case the Master of the Rolls declined to order specific performance, but damages afforded apparently a complete remedy against the lessee. The contract for a lease is made with the Court, and, as pointed out by Lord Justice Gifford in the case I have mentioned, the approval by the Judge of the offer constitutes the contract. I think that a Court has complete power to enforce summarily a contract made by it when managing or administering an estate, whatever that contract may be."

"With regard to the second question, it must be remembered that the contract was completed and acted upon before the suit was dismissed, and in the ordinary course the lease would also have been signed before that event happened."

"It is admitted that the rights of the lessee are not affected by the dismissal of the suit, but it is contended that his remedy is altered. I do not assent to this contention. The lease is wholly independent of the result of the suit. I do not think that the fact that the Court has ceased to manage the property takes from it the power of enforcing the performance of subsisting contracts made by it. The dismissal of this suit only determines the rights of the parties *inter se*, and I do not think that the

[1] 17 W. R. (Eng.), 342, 837.

dismissal of the suit would any more than any other form of decree affect the remedies of the lessee."

"With regard to the third question, I do not think that there are any circumstances in this case which would justify me in refusing an order for the execution of a lease. In terms of this summons I make such order."

"As to the security deposited by the lessee, he so deposited it with the Court, and relying on the safety which would be ensured by its being kept by the receiver, I do not think it would be right to require the lessee to leave the money with the Ranee, who has a limited interest only. The securities deposited by the lessee with the receiver will be paid into Court to the credit of an account to be entitled 'Andool Raj Lease Security Account.' The interest can be, from time to time, paid out to the lessee, but the principal cannot be paid out except on notice to the lessee and to the Ranee, or, in case of her death, the person or persons then entitled to the property subject to the *izarah*.[1]"

[1] *Surendro Keshub Roy v. Doorgasoondery Dossee*, I. L. R., 15 Cal., 256-259.

CHAPTER III.

RECEIVERS OF PROPERTY THE SUBJECT OF SUIT.

§ 18. General Principles—§ 19. Cases where property is *in medio*—§ 20. Cases where plaintiff possesses an admitted interest—§ 21. Cases where plaintiff's title is disputed by defendant claiming under legal title—§ 22. Miscellaneous cases—§ 23. Appeal.

§ 17. A CONSIDERABLE portion of the text-books is occupied with a discussion of the cases or instances in which receivers will be appointed, and references are given to all the decisions in which receivers have in fact been appointed or refused. This mode of treatment had its origin in the fact that in its inception the law of receivers was a case-made law of very gradual growth declared from time to time as necessity arose and with reference to the particular circumstances of the case in which the jurisdiction was exercised. Though precedent was added to precedent, there was yet no general statutory statement of the nature and extent of this form of jurisdiction which could only be ascertained by an enumeration of all the cases in which it had been exercised. This course is, however, no longer necessary or expedient. An excessive citation of case-law even where it is not, as is sometimes the case, of doubtful authority or inapplicable to present circumstances too often serves no other purpose than to confuse and to obscure the plain provisions of modern Statutes and Codes. In England by the provisions of the Judicature Act, 1873, all the jurisdiction of the Court of Chancery was transferred to the High Court of Justice

and by section 25, sub-section 8 of that Act, it is declared that a receiver may be appointed *in all cases* in which it shall appear to the Court to be *just* and *convenient* that such order should be made; and that any such order may be made either unconditionally or upon such terms and conditions as the Court thinks fit. The effect of this Act is to enlarge very much the powers which the Court of Chancery formerly possessed, and there is now no limit to the power of the Court to appoint a receiver except that such power is only to be exercised where "*just or convenient.*" The jurisdiction has been so much enlarged that receivers will now be appointed even on behalf of persons claiming against a legal title in cases in which the Court of Chancery could not have made the appointment.[1] So also in this country under section 503 of the Civil Procedure Code *whenever* it appears to the Court to be necessary for the realization, preservation or better custody or management of *any* property, moveable or immoveable, the subject of a suit, the Court may appoint a receiver of such property. Here again the question to be determined is one in the main, if not entirely, of fact. The Court may in any pending litigation appoint a receiver if the circumstances of the particular case require it. A Judge has therefore a wide discretion. But that discretion must be judicially exercised.[2] Though the discretion to grant relief will in the main be influenced by the particular facts of each case, it must also be guided by certain broad and well-established principles which have governed previous practice and which, though unexpressed, may be said to underlie the provisions of the Code.

In the first place the jurisdiction thus given must not be lightly but most cautiously exercised.[3] The relief is not

[1] Kerr, 1, 2, 92.
[2] v. *ante*, p. 32.
[3] *Mun Mohinee Dassee* v. *Ichamoyee Dassee*, 13 W. R., 60 (1870).

one *ex debito justitiæ*, but one which is purely within the judicial discretion of the Court. The power to appoint a receiver is not to be generally exercised as a matter of course, and it is not a reason for allowing an application that it can do no harm to appoint a receiver. The appointment of a receiver is in many cases a matter for the most serious consideration, for the Court by taking possession at the instance of a plaintiff may be doing a wrong, in some cases irreparable, to the defendant. For if the plaintiff should eventually fail in establishing his right, the Court may, by its *interim* interference, have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation.[1]

The observations of the High Court[2] made with respect to the exercise of the jurisdiction to grant injunctions and which *à fortiori* apply in the case of receivers, a remedy of a still more stringent character, may here be appropriately referred to.

"We must take leave to say this that the power of granting an injunction is one which has been perhaps a little lavishly bestowed upon the Courts in the mofussil in this country. It is a tremendous power, and one which the superior Courts most carefully guard themselves from exercising hastily or without solid grounds. And this is not the first occasion by any means in which the exercise of the power of granting an injunction, which has been conferred upon the smaller Courts in the mofussil, has led to results by no means satisfactory. Here a business, for aught we know, a valuable business, has been, since the first of October, suddenly and peremptorily

[1] v. *ante*, Ch. .

[2] *Baddam* v. *Dhunput Sing Bahadur*, 1 C. W. N., 430-432.

stopped until this the 12th of February, and stopped, as we must now pronounce it, in this Court to have been without the slightest legal foundation laid before the Court. We must express our regret that the officer who granted the injunction had not before him, when the application to dissolve the injunction was made, the legal considerations which ought to have then guided him. We should be very sorry in expressing our disapproval of the course taken by him, to say anything whatever in disparagement of that officer. He plainly does not understand the character of the jurisdiction he was exercising, and he is not to be blamed for that. A jurisdiction, originally, and perhaps properly, belonging only to superior Courts possessed of legal knowledge and experience, is imposed on Courts in the mofussil, which sometimes share with the victims of its exercise, the inconvenience of its being so imposed on them. It would be unfair to blame such tribunals much, if they do sometimes go astray in the use of it. But we must examine the course taken by the Deputy Commissioner. When applied to on the ground that under section 494 of the Code of Civil Procedure, notice should have been given, he says :—'I fail to see, nor has it been made clear to me, how the failure to serve petitioner with the required notice under section 494 of the Civil Procedure Code can have had anything to do in causing loss. The injunction was issued without notice as the matter was considered urgent in connection with offending religious prejudices and causing rioting.' In truth, the Deputy Commissioner, we do not say unnaturally but very erroneously, applied the full powers of an injunction for purposes relating rather to his executive than to his judicial functions, not, perhaps, quite correctly, even had he been

acting in his executive capacity ; because there is not one word in the proceedings from first to last which could properly had been (*sic : qu* "have led him") whether in his capacity of Colonel Garbett, Deputy Commissioner, or in his capacity of Subordinate Judge of this district, to come to the conclusion that there was any danger of a riot. Not one word is there in the proceedings from first to last indicative of such danger, save what is contained in the judgment which we have just read."

In an application for the appointment of a receiver it is sufficient if a *primâ facie* title to the property over which the receiver is sought to be appointed, is made out. The fact that a large amount of property is removed by the defendant under circumstances which may fairly give rise to suspicion during the pendency of a suit in which the question of title to that property is to be determined is in itself a sufficient ground for the appointment of a receiver.[1]

It is of course no ground for refusing to appoint a receiver that the acts complained of amount to a criminal offence, and that a criminal prosecution is available to the petitioner. Where in a suit for partition of the estate of a trading joint family, which estate belonged to the plaintiff and his brother, the eldest surviving member of the family, it appeared that the latter had for some time past misappropriated large sums of money and had thrown the accounts into confusion and the plaintiff applied for a

[1] *Sham Chand Giri* v. *Bhaya Ram Pandey*, 5 C. W. N., 365 (1894). In this case a receiver was appointed of the property of the shrine of Tarakeswar, liberty being given to move to extend the rule on fresh materials. The Court directed that the conduct of the daily *Sheva* was not to be interfered with, and that the receiver was to pay for them out of the offerings he received ; followed in *Sree Ram Das* v. *Mohabir Das*, I. L. R., 27 Cal., 279 (1899). And *see* as to removal of property, *Chandidat Jha* v. *Padmanand Singh Bahadur*, I. L. R., 22 Cal., 466 (1895).

receiver, the Judge dismissed the petition. The order was reversed on appeal by the High Court which observed as follows:—"The reason assigned by the Judge for declining to appoint a receiver is that the acts complained of amount to misappropriation rather than waste, and that the petitioners can hereafter institute a criminal prosecution. These are clearly not sufficient reasons. Section 503 of the Code authorises the appointment of a receiver for the preservation or better custody of property the subject of a suit. Whether property is wasted or misappropriated makes no difference for the purposes of this section. The future institution of a criminal prosecution will not enable a party to recover property that may have been misappropriated."[1]

Nextly, the situation of the property and parties must be considered. Where the property is as it were *in medio* in the enjoyment of no one, the Court can hardly do wrong in taking possession through its receiver. It is the common interest of all parties that the Court should prevent a scramble. Such is the case, amongst others, when a receiver of a property of a deceased person is appointed pending litigation as to the right to probate or administration. The appointment of a receiver or administrator *pendente lite* is a matter of course; no one is in the actual lawful enjoyment of property so circumstanced; and no wrong can be done to any one by taking it and preserving it for the benefit of the successful litigant. But where the object of the plaintiff is to assert a right to property of which the defendant is in possession or enjoyment the case is necessarily involved in further considerations.[2]

[1] *Hanumayya* v. *Venkatasubbaya*, I. L. R., 18 Mad., 23 (1894).

[2] *Owen* v. *Homan*, 4 H. L., 1032, 1033, referred to and followed in *Sidheswari Dabee* v. *Abhoyeswari Dabee*, I. L. R., 15 Cal., 818, 822, 823 (1888); *Chandidat Jha* v. *Padmanand Singh Bahadur*, I. L. R., 22 Cal., 459, 464, 465 (1895).

In the first place there are the cases in which the plaintiff has an admitted interest in the property in suit and in which no case of title arises, but a question does arise as to whether the management of the property shall be taken from those in possession of it, such as the cases of joint ownership, partnership, tenant for life and remainderman. The Court will not without sufficient grounds interfere with the defendant's admitted right to joint possession and management, though it will more readily do so when the relief is sought as ancillary to partition or dissolution, a decree for which will determine that right. In the third instance cited, the effect of an appointment of a receiver would be to disturb not merely a present but an exclusive possession in favour of a party whose interest is *in futuro*. Then there are the cases of trusts, executors or similar fiduciary relations. Here the creator of the trust or testator has himself declared the person in whom the trust for the administration of the property shall be reposed. Notwithstanding the plaintiff's interest the Court will ordinarily require a strong case to dispossess a trustee or executor who is willing to act. In the last class of cases the Court considers the question of the party entitled to management; in the first not merely this question but also the effect of the appointment on the beneficial interest of the defendant in the property for which a receiver is desired.

In the second place there are the cases of disputed title in which the defendant who is in possession denies the interest of the plaintiff altogether. Here the Court will not interfere by appointing a receiver when a right is asserted to property in the possession of a defendant claiming to hold it under a legal title unless a strong case is made out. And the reason is obvious. In such cases the Court, by appointing a receiver, interferes with the

possession before the title of the plaintiff, which is the issue to be tried in the suit itself, is made out, and should the plaintiff fail, the Court may, by its interim interference, have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation. In such cases therefore it exercises with the greatest care a discretion which must be governed by all the circumstances of the case.

Lastly, there are a large number of miscellaneous cases which fall within one or another of the above-mentioned subdivisions or partly in one and partly in another, according to the facts of the particular case.

In this Chapter the cases are dealt with in the following order :—(*a*) where the property is *in medio*, (*b*) where the plaintiff possesses an admitted interest, (*c*) where the plaintiff's title is disputed by the defendant claiming under legal title, (*d*) miscellaneous cases.

It necessarily follows from the nature of the jurisdiction as thus far disclosed, as well as from the purpose and object usually had in view in the appointment of a receiver *pendente lite*, that the remedy is a provisional or auxiliary one, invoked as an adjunct or aid to the principal relief sought by the action, and not always or necessarily the ultimate object of that action. The application for a receiver may succeed or fail, and yet in no manner affect the principal controversy or determine the final result. And in this respect the appointment of a receiver *in limine* bears no closer relation to the action in which this extraordinary relief is sought than an attachment in aid of an action upon a promissory note bears to such action. The appointment of a receiver *in limine*, therefore, like the granting of a preliminary or interlocutory injunction, is not an ultimate determination of the right or title, and the Court, in passing upon the application, in no manner

decides the questions of right involved, nor anticipates its final decision upon the merits of the controversy; the leading idea upon the preliminary application being merely to husband the property or fund in litigation for the benefit of whoever may be determined in the end to be entitled thereto. The decision upon the application for a receiver *pendente lite* is, therefore, without prejudice to the final decree which the Court may be called upon to make, and the Court expresses no opinion as to the ultimate questions of right involved. And if the plaintiff presents a *primâ facie* case, showing an apparent right or title to the thing in controversy, and that there is imminent danger of loss without the intervention of the Court, the relief may be granted without going further into the merits upon the preliminary application.[1] Indeed, upon an interlocutory application for a receiver, a Court of Equity usually confines itself strictly to the point which it is called upon to decide, and will not go into the merits of the case at large, since the Court is bound to express its opinion only to the extent necessary

[1] High, § 6, citing amongst other cases, *Leavitt* v. *Yates*, 4 Edw., Ch., 162. *Leavitt* v. *Yates* was a bill to set aside a deed of trust transferring certain securities, and a motion upon bill and answer for an injunction and for a receiver to take charge of the securities *pendente lite*. McConn, Vice-Chancellor, observes: "The argument has embraced all the points which the pleadings are calculated to present when the cause shall be brought to a hearing for a final decree; but it does not follow that a decisive opinion is to be expressed in this stage of the cause upon the rights of all the parties; for whatever may be the result of a motion of this kind, the general understanding is that *it is without prejudice to the ultimate decision* which the Court may be called upon to make. Insolvency and danger to the fund, pending the litigation, with a *primâ facie* case and probable cause for sustaining the bill, are or ought to be sufficient in the first instance to found an injunction and a receivership upon, without going minutely into the merits. My own observation has taught me that, in general, it is most prudent and best promotes the ends of justice to go no further upon the motion."

to show the grounds upon which it disposes of the application.[1]

When the Court simply refuses at a particular stage of a case and in a particular proceeding to entertain an application, and another application the same as the former one based upon substantially the same allegations of fact is made to another Judge, the same reasons existing for refusing to entertain it: though the former decision is not such as to enable the defendant to raise the plea of *res judicata*, the Court will refuse to make the order asked for. Under such circumstances though the jurisdiction of the Court to entertain the application is not ousted by the former proceedings, it is contrary to the usual procedure and practice of the Court for one Judge to make an order which has been refused by another Judge, even though arguments should be urged before him which were not urged before the Judge to whom the first application was made. If an order is wrongly refused, the proper course is to seek to review it, or to appeal from it, not to seek to obtain the order by resorting to another Court.[2]

[1] High, § 6, *Skinners Company* v. *Irish Society*, 1 Myl. & Cr., 162. *See* also *Conro* v. *Gray*, 4 How. Pr., 166. High, § 6, *Prosonomoyi Devi* v. *Beni Madhub Rai*, I. L. R., 5 All., 561 (1883) ["without in any way anticipating the result of the suit in the course of which the order now before us on appeal has been made, etc.]; *Sidheswari Dabi* v. *Abhoyeswari Dabi*, I. L. R., 15 Cal., 823 (1888) ["Our observations are of course based on the limited materials before us and can have no effect upon the ultimate decision"] *Sia Ram Das* v. *Mohabir Das*, I. L. R., 27 Cal., 282 (1899) ["Although we are far from wishing to prejudge the case in any way we certainly think a fair *primâ facie* case has been shown to exist on the side of the plaintiff. But as we have said we do not wish to prejudge the case; and we must here point out that no evidence on oath has been given. There are nothing but affidavits to go upon; and therefore the view we take upon these affidavits may entirely be set aside when the witnesses are cross-examined—as cross-examined they will be—before the Subordinate Judge at the trial."]

[2] *Motivahu* v. *Premvahu*, I. L. R., 16 Bom., 511 (1892).

Cases where the property is *in medio*.

§19. Where the property is as it were *in medio*, in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble. A leading illustration is to be found in the case when a receiver of the property of a deceased person is appointed pending litigation as to the right to probate or administration. No one is in the actual lawful enjoyment of property so circumstanced, and no wrong can be done to any one by taking it and preserving it for the benefit of the successful litigant.[1] In such cases, therefore, the appointment of a receiver is almost a matter of course.

Testamentary suits.

Under the practice of the English Law of Chancery, receivers were frequently appointed pending a litigation in the Ecclesiastical Court over the probate of a will or the right to administer an estate. The relief was granted in this class of cases, not because of the contest in another Court, but because there was no person to receive the assets, and it was therefore the duty of a Court of Equity to lend its aid for the preservation of the assets pending the litigation. The Court acted solely with a view to the preservation of the property. After, however, the passage of the Probate Act, 20 and 21 Vict., C. 77, which abolished the testamentary jurisdiction of the Ecclesiastical Courts and established a Court of Probate the Court of Chancery, as a general rule, refused to exercise its power in such cases where an administrator *pendente lite* had been appointed under the Act, so that a conflict between the Courts might be avoided. The administrator in such case could do everything that was necessary for the protection of the property. There was nothing, however, in the Probate Act which ousted the original jurisdiction of

[1] *Owen* v. *Homan*, 4 H. L., 1032-1033.

the Court of Chancery, and if an Administrator had not been appointed by the Probate Court, the Court of Chancery appointed a receiver as a matter of course.[1]

In this country also the Courts have power to appoint a receiver in a testamentary suit.[2] In this case the Court observed as follows :—

Yeshwant v. *Shankar.*

"In England, the Court of Chancery, in cases of disputed representation in the Ecclesiastical Courts, was in the habit, on a proper case being made, of appointing, *pendente lite*, a receiver of property the representation of the former owner of which was in dispute : see *Watkins* v. *Brent*,[3] *Rendall* v. *Rendall* ;[4] and since the Court of Probate Act, 1857, came into force, the Court of Chancery has exercised the same power—*Parkin* v. *Seddons*.[5] But these were orders of a Civil Court made in suits filed for the specific purpose of obtaining a receiver. The Court of Probate Act, 1857, however, gave authority to the Testamentary Court to appoint an administrator provisionally to take charge of the personal estate of a deceased person pending any suit touching the validity of his will, and to appoint such administrator or any other person receiver to collect the rent of and to manage his real estate. These provisions have been consolidated and transferred into the Indian Succession Act (X of 1865), section 239, which empowers the Court to appoint an officer to take and keep possession of the property of a deceased person until probate or letters of administration are granted. This section, however, is not repeated in the Probate and Administration Act, V of 1881. I

[1] Kerr, 23-25, 27-29; High, § 46; Beach, § 64.

[2] *Yeshwant Bhagwant Phatarpakar* v. *Shankar Ramchandra Phatarpakar*, I. L. R., 17 Bom., 390-392 (1892).

[3] Myl. & Cr., 102.

[4] 1 Hare, 152.

[5] L. R., 16 Eq., 34.

should have no hesitation in acting under this section if the will was one to which the Indian Succession Act applied, but as the will in the present case would apparently be governed by the Probate and Administration Act, 1881, it is necessary to look more closely into the question."

"The section by which this will would be excluded from the Indian Succession Act is section 331, but that only excludes from the operation of that Act intestate or testamentary succession of Hindus, and does not forbid the procedure provided thereby (in the course of granting probates, &c.), to be applied to Hindu or other excepted wills. See the case of *Kokya Dine*[1] which was with reference to a Buddhist will. Why, then, was this useful provision not inserted in the Probate and Administration Act, 1881? My own impression is that the framers of that Act having provided in section 55 that proceedings in relation to the granting of probate and letters of administration should be regulated by the Civil Procedure Code, and knowing the provisions of that Code as to receivers, and seeking to avoid the repetitions, in the Probate Act, of any provision which was in the Civil Procedure Code, have left the appointment of a receiver to be regulated by the provisions of that Code. For these reasons, I should, without difficulty, have come to the conclusion that this Court in its testamentary jurisdiction had power to appoint a receiver. Mr. Jardine has, however, referred me to a motion in Testamentary Suit No. 11 of 1891, in which Farran, J., on the 13th August 1891, refused to appoint a receiver. There is no written judgment, and consequently I cannot ascertain whether the refusal was on the merits or on a point of law. It was, however, argued that the property of

[1] 2 B. L. R., A. C. J., 79.

the deceased was not the subject of a suit. Possibly not directly, but the present suit is to determine who is to have the possession and management of the property of the deceased,—in fact, who is to be the person in whom all the rights of the deceased are to vest, and thus become the legal owner. If a suit were brought on the civil side to determine who had the right to the possession and management of the property, the provisions of the Specific Relief Act, I of 1877, would ordinarily require a prayer to be inserted for possession of the property, but I cannot see the substantial difference, as regards *interim* remedies between a suit in this form and a suit on the testamentary side, the result of which will be to declare that, by virtue of the provisions of a will, a certain person has the right to stand in the shoes of a deceased owner, and thus be entitled to have the possession and management of all his property. It seems to me that the property is the subject of the suit, in the one case, directly, because possession is sought, and in the other, because the decree will determine who is to have authority over, and to be entitled to get possession of, certain property which is set out in a schedule to the petition for probate or letters of administration. Consequently, I see nothing in the law relating to procedure which would prevent me appointing a receiver in this case without regard to any consent on the part of the plaintiff. It is true that the Administrator-General's Act empowers the Court to authorise and require the Administrator-General to take charge of property of deceased persons which is in danger, yet I doubt whether this provision deprives the Court of any other powers it may possess ; and, although in many cases the Administrator-General might most conveniently be appointed, a receiver might be better in others. In the present case, a receiver has by consent been appointed for certain

purposes, and I, therefore, consider that, if the Court is to take any action, it will be better to enlarge the present receiver's powers than to enjoin the Administrator-General to take possession of the assets of the estate."[1]

In this country where the testamentary and civil jurisdictions, whether legal or equitable, are exercised by the same Courts, the English cases relating to conflicting jurisdictions are not of importance. If, however, an application were made for the appointment of a receiver of an estate over which an administrator *pendente lite* had at the time of the application been appointed in a probate proceeding, such application would probably be refused, and if a receiver had already been appointed he would doubtless be discharged, and the administrator allowed to receive the estate. It has been held that a Court of Probate has power to appoint an administrator if it is just and proper to do so, although a receiver has been appointed by the Court of Chancery in a suit pending between the same parties and affecting the same property as the testamentary or administration suit.[2] The Courts in their testamentary jurisdiction frequently in cases of litigation concerning probate or administration appoint an administrator *pendente lite* instead of a receiver, which is perhaps in certain cases the more correct course.

While there were frequent instances where the English Court of Chancery allowed receivers pending litigation as to the probate of a will when the relief was necessary for the preservation of the estate, the fact that after a will has been duly admitted to probate, litigation is instituted to recall or revoke the probate, does not

[1] *Yeshwant Bhagwant Phatarpakar* v. *Shankar Ramchandra Phatarpakar*, I. L. R., 17 Bom., 390-392 (1892).

[2] Kerr, 27, 28; Henderson's Testamentary Succession in India, 180.

of itself, constitute sufficient ground to justify a Court of Equity in interfering by a receiver with the possession of the parties entitled thereto under the probate. And this is so even though the probate issued in "common form" has been ordered into Court, and the parties directed to prove in "solemn form."[1] A special case was required to be made out for doing so. The general principle was stated to be that where there is a legal title to receive, the Court ought not to interfere, unless where the legal title is abused or that there is proof that is in danger of being so.[2] So the Court has interfered where a fair *primâ facie* case of fraud was made out, or where it appeared that the legal right to receive the assets was being, or in danger of being, abused whether from insolvency or otherwise, or where it appeared that there was no executor or administrator in existence with the right and power to act as such, notwithstanding that there was no improper conduct.[3] The Court may also in an application to revoke probate appoint an administrator *pendente lite*.[4]

In the undermentioned case an application was made for probate. The petition was received, but the Court refused to issue probate as a caveat had been entered and ordered the matter to be set down as a contentious cause. The applicant, therefore, applied for a receiver pending the litigation as to the right to probate, and a receiver was appointed with the consent of the caveatrix. Subsequently on the grant of probate the receiver was discharged, and the caveatrix was ordered to pay all costs occasioned by his appointment.[5]

[1] *Newton* v. *Ricketts*, 10 Beav., 525; High, § 701; Beach, § 65; Kerr, 25.

[2] *Per* Turner, L. J., in *Devey* v. *Thornton*, 9 Ha., 229.

[3] Kerr, 25-26.

[4] Indian Succession Act, s. 218; Probate and Administration Act, s. 34.

[5] In the goods of *Luchminarain Bogla*, Suit 4 of 1901, Cal. H. C., Stanley, J., 26th March 1901.

In the same case the will was alleged to be a forgery ; a receiver was, as stated, appointed upon the motion of the applicant for probate consented to by the caveatrix. Upon judgment declaring the applicant entitled to probate the applicant applied for and obtained an order against the defendant that the latter should pay all costs occasioned to the estate by the appointment of a receiver, the Court holding that though the receiver had been appointed upon the motion of the applicant for probate, such a course had been rendered necessary by the conduct of the caveatrix in opposing the will. Directions were given to the Taxing Master to ascertain these costs.[1]

Cases where plaintiff possesses an admitted interest.

§ 20. Nextly there are the cases in which the plaintiff has an admitted interest in the property in suit. In the classes of cases to be considered no question of title in general arises but a question whether the management of the property shall be taken from those in possession of it does arise.

Joint tenants and tenants-in-common.

The Court of Chancery following the general principles of Courts of law was in general, and owing doubtless to the equality of right, possession, and user in such cases, little disposed to interfere between tenants-in-common or joint tenants. But a co-sharer is entitled to possession and may therefore not be excluded ; he is also entitled to enjoyment of the property in its actual condition and is therefore entitled to be protected from waste. It may be stated as a general rule therefore that a receiver could not be appointed unless in cases of destructive waste or gross exclusion or where the property is of such a nature as in the case of mines that its chief value consists in its continual working and that this is prevented by disputes about the management. The same considerations are

Judgment reported in 5 C. W. N., cclxi (1901).

[1] In the goods *of Luchminarain Bogla*, 5 C. W. N., cclxi (1901).

applicable to the case of tenancy-in-common in equitable estates. As regards the extent of the receivership in the class of cases under consideration see Chapter II, *ante*. The order appointing a receiver will sometimes be in the alternative that, unless the co-tenant give security to account for the portion of the rents due to his co-tenant, a receiver will be appointed. Where some of the tenants-in-common are infants there may be a receiver over the whole estate with direction to pay to the adults their shares in the rents.

While as has been already stated equity is generally averse to extending the aid of a receiver, as between joint owners or tenants-in-common, yet in cases of mining property or collieries there are from the nature of the property stronger reasons why the relief should be allowed when there is a disagreement as to the management of the property than in cases of ordinary real estate. The principal reasons for such an appointment are that property of this nature derives its chief value from the continued working of the mine, a cessation of which would lead to considerable loss. Moreover such property cannot conveniently be carried on by a large number of persons, each employing independently a manager and workmen. To avoid such complications and embarrassments, receivers have been appointed of mines which are to be considered in the nature of a trade and where the interest in land which parties take as tenants-in-common is in the nature of a trade, a receiver will be appointed or refused on the same principles as in partnership cases.[1]

Though persons may have surrendered their right to joint management they yet have a right to see that

[1] High, §§ 603—608; Kerr, 96—98; Beach, §§ 489—491, and as to waste and trespass by co-sharers in India *see* § 78 *et seq.*, of the Author's Law of Injunctions and cases there cited.

their interest in the joint property is protected and to the appointment of a receiver if necessary. This principle is illustrated by the undermentioned case[1] in which the facts were as follows :—

Kumara Tirumalai Naik v. *Bungaru Tirumalai Naik.*

Early in the eighteenth century two villages were granted by the Zamindars of Sivaganga and Guntamanaikanur to the last of the Naik rulers of Madura for the maintenance of the rank and dignity of his family, which was now represented by the plaintiffs and defendants Nos. 1 to 23. The property was long managed by the representative for the time being of the senior line. In 1844 one of the junior members instituted a suit for partition, which terminated in a decree declaring the corpus of the property to be indivisible and the annual produce to be divisible in certain shares. Subsequently in 1857 a compromise was entered into, by which the parties agreed to vary the distribution of the shares, but they agreed that the management of the estate, indivisible and inalienable, should continue to be vested in the eldest line, subject to certain supervision on the part of the other members. The compromise was long acted upon by the family, but in 1892 the representative of the senior line died, leaving only his widow and infant sons. The widow, as guardian of the elder son, then entered on the management, and, being Gosha, delegated it to a stranger.

The plaintiffs representing a junior line now sued for the removal of these persons from management and the appointment of another manager, alleging both that they had no right to the managership, and that they had been guilty of mismanagement. All the members of the family

[1] *Kumara Tirumalai Naik* v. *Bungaru Tirumalai Sauri Naik*, I. L. R., 21 Mad., 310 (1898).

were made parties to the suit. The prayers of the plaint were as follows :—

"That defendants, Nos. 1 and 24, be declared incapable of managing the affairs of the two villages hereunder mentioned in Schedule A, and they and twenty-fifth defendant be removed from the said management.

"That the Court be pleased to appoint first plaintiff or other persons among the family whom the Court may think fit for the management of the plaint properties with all the powers incidental to the management, such as grant of patta to the raiyats, distribution of the income among pangalies, &c.

"That it be declared that the power of agency granted by twenty-fourth defendant to twenty-fifth defendant is invalid and not binding on plaintiffs.

"That twenty-fourth and twenty-fifth defendants be decreed to give plaintiffs personally, and from the estate of first defendant, Rs. 421-6-9 on account of plaintiff's share of produce, which they could, on proper managements, have got for fasli 1304 as per Schedule C, and also produce of subsequent faslis.

"That the Court be pleased to declare that cowles in favour of defendants Nos. 26 to 32 by defendants Nos. 1 and 24 specified in Schedule B are not binding on plaintiff and other members of the family, and to decree possession of the lands on behalf of the family to whomever the Court may appoint as manager."

It appeared that the plaintiffs had not received their proper share of the produce, and the defendants in management denied in the pleadings their right thereto. The plaintiffs had not obtained a certificate from the Collector under the Pensions Act XXIII of 1871, and it appeared that the grant of the villages had been confirmed as an *inam* by the British Government :

Held (1) that the suit did not fall within the provisions of Pension Act, section 4, and a certificate of the Collector was accordingly unnecessary.

(2) That the compromise was binding on the parties, and that under the compromise the plaintiffs had no right to joint management, and

(3) That the widow of the last manager should be removed from the managership, and that until one of her sons came of age, the estate should be managed by a receiver appointed from among the members of her family. In the judgment the Court observed as follows :—

"The most material question in the suit which is now left for our decision is, whether the twenty-fourth defendant should not be removed from the management, and if she is removed therefrom, how the management is to be carried on during the incapacity of defendants Nos. 1 and 2 by minority or otherwise. The settlement of this question depends very much upon the settlement of the question of what interest in the estate the members of the family, other than defendants Nos. 1 and 2, possess. The Subordinate Judge has found that the first and second defendants are the absolute owners, and that the other members have only a right to *maintenance* according to the shares agreed upon. But we cannot concur in this view. The right, which the other members of the family undoubtedly have to specific defined shares out of the net income of the estate, is certainly greater than the right to mere maintenance. An absolute right to take the rents of land ordinarily involves a right to the land itself (see *Mannox* v. *Greener*,[1] and section 159 of the Indian Succession Act, where the same principle is laid down). But, where there is a clear intention that only the profits

[1] L. R., 14 Eq., 456.

of the land are to be taken and not the *corpus*, the general rule would not apply. Now, here we have both in the decree in the suit of 1844, and in the *razinamah* (Exhibit C) a clear prohibition against the division of the *corpus* which is declared to be impartible. But for this prohibition, the members of this family would be entitled by virtue of the division of the shares of the produce to a division of the lands, and it is only the decree, which we cannot question, that prevents such division. But that the members of the family have a common right in the property is declared in the answers by the pandits. In their first answer, they say that the estate having been granted for the maintenance of this family belongs to all its descendants, and in their second answer they refer to the property as common to all the members of the family. Their opinion so clearly expressed is no doubt in accordance with the law. So that we must view the plaintiffs and defendants Nos. 3 to 23 as co-owners of the property with defendants Nos. 1 and 2. That being so, *they would have an equal right to management* with defendants Nos. 1 and 2, had it not been for their own agreement in the *razinamah* that the sole right of management should remain in the eldest branch of the family represented by defendants Nos. 1 and 2. That precludes them from claiming such a right now. It is urged on their behalf that the *razinamah* (Exhibit C) itself contemplates a right to joint management. But we are altogether unable to read it in that light. It seems to us clear that the only right reserved to the other members of the family after placing the sole right of management in the senior branch of the family is that of supervision only. Although they have thus bartered away their right to joint management, they yet have *a right to see that their interest in the joint property is protected*, and they

very naturally complain that the affairs of their estate are now being actually managed by a complete stranger, the twenty-fifth defendant, the agent of the twenty-fourth defendant. The twenty-fourth defendant is clearly not a proper person to be entrusted with the management of the whole estate, for she is a Gosha lady and is, in consequence, compelled to employ an agent to do work for her. Moreover, he or she or both together have not only omitted to distribute to the plaintiffs their proper share of the produce of the land, but have gone further and denied their right to it in this suit. These circumstances are quite sufficient to disentitle her to hold the management any longer. As the natural guardian of the first and second defendants she may be entitled to look after their interest, but their interest is, as we have shown, only a small portion of the whole interests involved. We shall, therefore, direct her removal from the managership, and with her, of course, the twenty-fifth defendant, her agent. It remains to determine who is to look after the estate, while the first and second defendants, who are entitled by right to do so, are incapacitated by reason of their non-age. The *razinamah* contains no provision for a case like this, where the person entitled to manage is incompetent, and we have found that the other members of the family are not entitled as of right to take up the management. In the absence then of a competent hereditary manager, we think the proper course will be to direct the appointment of a receiver for the proper preservation of the property, until the first or second defendant is competent to undertake the duties of hereditary manager. We shall, therefore, direct that one of the parties interested in the property, either the first plaintiff or such a one of the defendants Nos. 3 to 23 as is a major and otherwise eligible, be appointed as receiver of the estate without

remuneration, until the first or second defendant attains majority, or until further orders. It will be left to the Subordinate Judge to select the individual, and he will take security from him to the amount of one year's income."[1]

Where parties to a partition suit agree at the outset to have a receiver, if the appointment seems reasonably necessary to preserve and maintain the rights and interests of the parties, the Court will act; and whenever it appears during the prosecution of a suit in partition between tenants-in-common or joint tenants that a receiver is necessary to protect the interests of all the parties, the Court will upon proper application appoint a receiver of the property.[2] Partition.

Receivers have frequently been appointed in this country in suits for partition of property.

The undermentioned case[3] was a suit for a declaration that an indenture (being an agreement to mortgage) dated the 13th May 1886, and executed under the authority of an order dated the 6th May 1886 by the receiver appointed in two pending suits, created a valid charge in favour of the plaintiff over the properties specified in the schedule to the agreement (being the whole of the joint estate in which the defendants were interested), and for an account and sale. The present defendants were also parties to the above pending suits in which the receiver was appointed, and the agreement was executed by the receiver in his own name and purported to create a charge on the entire

[1] *Kumara Tirumalai Naik* v. *Bungaru Tirumalai Sauri Naik*, I. L. R., 21 Mad., 310 (1898).

[2] Beach, § 492; High, § 607. In England under the Judicature Act, 1873, the Court has jurisdiction in a partition action to appoint a receiver until the trial, although there has been no exclusive occupation. *Porter* v. *Lopes*, 7 Ch. D., 358.

[3] *Poreshnath Mookerjee* v. *Omerto Nauth Mitter*, I. L. R., 17 Cal., 614 (1890).

property. The agreement was drawn and caused to be executed by the attorney for the plaintiffs in one of the above suits at whose instance the order of the 6th May 1886 was obtained and who had the carriage of the order. The defendants admitted that the plaintiff advanced the money, and that it was applied for the purposes for which the Court gave the receiver liberty to raise money, but they contended that the order was made without jurisdiction, that the plaintiff should have made an application in the suit in which the order was made, and that the receiver had no authority to bind the parties in his own name. The decree in the Lower Court was in the plaintiff's favour.

Poreshnath Mookerjee v. *Omerto Nauth Mitter.*

The judgment of Mr. Justice Trevelyan in the Lower Court was as follows :—

"Several questions were raised by Counsel for the defendants. It was first contended that the order authorising the mortgage was made without jurisdiction, and was therefore void. Mr. Phillips for one of the defendants argued that the Court had no jurisdiction in a partition suit to appoint a receiver, and that it had no jurisdiction to authorise the receiver to deal with the property. I cannot assent to this argument. I do not think there can be any doubt that property sought to be partitioned is the subject of a partition suit ; and if that be so, section 503 of the Civil Procedure Code authorises the Court to appoint a receiver. Receivers have frequently been appointed in partition suits in this Court. Where it is necessary for the preservation of the estate it has always, so far as I know, been taken to be law in this Court that the Court may authorise the receiver to charge the property. The Court, if it can appoint a receiver, has ample powers to provide for the management of the property ; and if the property is in danger

of being lost, the Court has surely power to prevent such loss by raising money on it. The Court can deal with property which is under its control just as completely as the owner of the property can deal with it. How far the Court ought to allow a sale or a pledge of course depends upon the circumstances of each case. I think it is clear that the Court has jurisdiction.

"The next contention which I think I must notice is that this suit does not lie, but the plaintiff's remedy (if any) is by application in the suits in which the order was made. The fact that the plaintiff may have a remedy in those suits does not exclude his remedy in this suit. I know of no provision of law which takes away his remedy, and no such provision or precedent has been cited to me. It is by no means clear that the present plaintiff could have in the other suits obtained the relief he now seeks. He might have in those suits compelled the drawing up of a formal mortgage, but it may be a question whether he could have therein asserted his remedies under such mortgage.

"The next point was that the receiver could not have bound the parties by an agreement made in his own name. The order of the 18th of March 1886, under which the receiver acted, gave him liberty to raise Rs. 30,000 by mortgage of the joint estate at such rate of interest and upon such terms as he should think fit. He was also given liberty to execute the mortgage and get the same registered on behalf of the parties interested in the joint estate. This question can, I think, be answered by reference to the case of *Wilkinson* v. *Gungadhur Sircar*[1] which is the leading case in this country on the position of a receiver. Mr. Justice Phear there points out (p. 488)

[1] 6 B. L. R., 486.

that in his opinion whatever the receiver rightly does with regard to the property under his control, he does in the character of agent for the owners of the property. I think that this principle applied just as much with regard to parties to the suit who opposed his appointment or who objected to his receiving particular powers, as it does to the parties at whose instance he is appointed or set in motion. This being so, the ordinary law of principal and agent applies, and the defendants other than Kissory Mohun Roy and Komal Coomary Dabee must be held liable for the acts of their agent."

The plaintiff obtained an ordinary mortgage-decree for an account and sale, but no personal decree except as to costs, with liberty to apply for an order for sale of other property, the subject-matter of the suit.

Five of the defendants appealed. It was argued for the appellants that the order of the 6th May 1886 went beyond what the Court has power to do, and did not bind the shares of the defendants: that the Court could not interfere with the enjoyment of the other co-sharers, or place the whole of the joint estate, out of which the plaintiff sought to have his share partitioned, in the hands of a receiver and give the receiver liberty to raise money on the security of the entire estate: that if all the co-sharers desired it, a receiver might be appointed in cases of necessity.

The judgment of the Court of Appeal (Petheram, C. J., and Pigot, J.), was as follows:—

"This is an appeal by five out of a numerous body of defendants in an action brought to enforce a charge upon certain estates belonging to all the defendants jointly, and which the plaintiff contends was created by a deed dated 13th May 1886, executed by Mr. Broughton in the character of receiver, he having been appointed receiver

of all the estates in question by an order of this Court, dated 18th March 1886, made in two consolidated suits which were then pending between the various defendants to the present suit, for the partition of such estates, and who had, by another order of this Court, dated 6th May 1886, been authorized to raise the sum of Rs. 50,600 on the security of the estates, which had been so placed in his hands for the purpose of paying the putni and mourasi rents which had fallen due on 1st May 1886. Neither of the present appellants was seeking partition in either of the two consolidated suits, and the applications upon which the orders in question were made were resisted by them and were made adversely to them, notwithstanding such resistance. The facts are not in dispute, and the questions which have been argued before us on this appeal are (1) whether the Court has jurisdiction to place the whole of a joint estate out of which a plaintiff seeks to have his share partitioned, in the hands of a receiver; and (2) whether it has any jurisdiction to order that a receiver so appointed shall be at liberty to raise money on the security of the whole of such joint estate. It is clear that if the Court had jurisdiction to make the orders, no question can be raised in this suit as to their correctness, they having been made by a Court of competent jurisdiction in the course of other proceedings and being now existing orders of such Court.

"The first question mainly depends on the meaning to be given to the words 'property the subject of a suit' in section 503 of the Code of Civil Procedure, when the suit is one for the partition of a joint estate. Mr. Phillips for the appellants has contended that the sole purpose of such a suit being to give the plaintiff possession of a divided share, and for that purpose only to divide the joint property, the only property which is

the subject of the suit is the plaintiff's share, whether joint or divided, and that the Court has no jurisdiction to place anything more than that share in the hands of a receiver. For the plaintiff it was contended that the property in suit is the whole joint estate, inasmuch as until it has been partitioned the plaintiff has an interest in every portion of it. I think that the contention of the plaintiff must prevail, as not only is he interested in every portion of the joint property before it is partitioned, but by the partition the title of each of the joint owners is changed, the decree being carried out by mutual conveyances between the joint owners of the interest of the others in the several shares allotted to each. This view appears to be in accordance with the practice of this Court, as it seems that receivers of the entire joint estate have been appointed in partition suits, and is also in accordance with the practice of the Court of Chancery in England acting under the Judicature Act, 1873, section 25, sub-section 8—see *Porter* v. *Lopes*,[1] and with the practice of that Court before the passing of that Act (*Searle* v. *Smales*[2]), even where there had been no exclusion.

"The second question depends on the meaning of section 503, sub-section (*d*). By that sub-section the Court has powers to grant to a receiver such powers for the protection, preservation, and improvement of the property as the owner himself has. It is in my opinion clear that when it is decided that the property in suit means the entire joint property, it follows that the words 'the owner' at the end of the sub-section must mean the whole body of owners to whom the joint estate belongs; and what we have to decide is, whether a power

[1] L. R., 7 Ch. D., 358.

[2] 3 W. R. (Eng.), 437.

to raise money on the property itself *may* be necessary for its own preservation. In considering this question, we must have regard to the conditions under which estates are held in this country, one of which is that they are liable to be sold if the rents and revenue due upon them are not paid, and when that fact is appreciated, it is apparent that the power to take the estate out of the hands of the owners and to place it in the hands of a receiver with power to do what is necessary for its protection, must include a power to raise money to pay rent or revenue when it is necessary to do so; and to hold otherwise would be to hold that a receiver appointed to protect the estate could not interfere to prevent its being lost to the parties interested, although his appointment put it out of their power to protect it themselves. For these reasons I think that this suit was properly decreed, and this appeal must be dismissed with costs.[1] "

Tenant for life: remainderman: Hindu widow.

It may be observed that there is in general nothing peculiar in the nature of the various estates in real property which is sufficient to affect the discretion of the Court in appointing a receiver, but some of the authorities involving the estate of a life tenant and in which the Court has interfered to protect that estate in favour of the remainderman may be referred to here.[2]

Waste on the part of a Hindu widow in possession being proved, it is not competent to the Court to put the reversioner into possession assigning maintenance to the widow. A manager, who may be the reversioner if a fit person, should be appointed to the estate accountable to the Court.[3]

[1] *Poresh Nath Mookerjee* v. *Omerto Nath Mitter* [1890], I. L. R., 17 Cal., 614.

[2] Beach, § 488; Kerr, 75, 76.

[3] *Musst. Maharani* v. *Nanda Lal Misser*, 1 B. L. R., A. C. J., 27 (1868).

Partnership.

As it is not the province of the Court to create a co-partnership, so it is equally foreign from its functions to conduct its business. It never could have been contemplated that a Court of Chancery should become the superintendent of the private affairs of individuals. Its legitimate province is to adjust the rights and settle the disagreements of parties growing out of such transactions.[1] As a general rule, therefore, a receiver will not be appointed unless a dissolution of the partnership be sought,[2] though cases have arisen in which the Courts have appointed receivers though dissolution was not sought.[3] The Court does not, in general, interfere for the management of a partnership except as incidental to the object of the action to wind up the concern and divide the assets.[4] Were the Court to adopt any other rule it might, in the language of Lord Eldon, make itself the manager of every trade in the Kingdom.[5] It is not the province of the Court to become the superintendent and manager of the private business of litigants, but a receiver may be directed to continue the business a sufficient length of time to enable the Court to determine the rights of the parties' litigants. While, therefore, the Court will not sanction the permanent or continued management of a partnership business in the hands of a receiver, he may, in a proper case, be allowed to continue the management of the business pending legal proceedings for a dissolution in order that the goodwill may be preserved to the ulti-

[1] *Allen* v. *Hawley*, 6 Fla., 146 (Amer.), *per* Dupont. J.; High, § 480.

[2] High, § 509; Kerr, 78; *Goodman* v. *Whitcomb*, 1 J. & W., 589; *Hall* v. *Hall*, 3 Mac. & G., 79; *Roberts* v. *Eberhardt*, Kay, 148.

[3] See *Const.* v. *Harris*, Turn. & R., 496, a peculiar case; Kerr, 79; High, § 513; *Hall* v. *Hall*, supra [threatened destruction of partnership concern or where the question was of receipt of money only]; *Medwin* v. *Ditchman*, 47 L. T., 250 [securing of property pending dispute between partners].

[4] *Waters* v. *Taylor*, 15 Ves., 13.

[5] *Goodman* v. *Whitcomb*, supra.

mate purchaser and its full value be realized by the partners at a final sale and to prevent great loss to the parties.[1] It is not necessary, however, in order to induce the Court to appoint a receiver that the action should expressly pray for a dissolution. It is enough that it be plain that it is necessary to put an end to the concern.[2] On the other hand, it is obvious that the mere fact that the action may pray a dissolution is not a sufficient ground for the appointment of a receiver. The rule may be stated in general terms that to warrant a receiver in partnership cases such a state of facts must be shown by the party complaining, as if proven at the hearing, will entitle him to a dissolution.[3] The doctrine is stated by Lord Eldon in *Goodman* v. *Whitcomb*,[4] as follows:—"This is a bill filed for the purpose of having a dissolution of the partnership declared, and if the Court can now see that that must be done, it follows very much, of course, that a receiver must be appointed. But if the case made stands in such a state that the Court cannot see whether it will be dissolved or not, it will not take into its own hands the conduct of a partnership which only may be dissolved. It may be a question whether the Court will not restrain a partner, if he has acted improperly, from doing certain acts in future, but if what he has done does not give the other party a right to have a dissolution of the partnership, what right has the Court to appoint a receiver and make itself the manager of every trade in the Kingdom?" The Court, therefore, will only act if it sees there is an actual present dissolution arising from the acts of the parties or that at

[1] High, § 480, 481.
[2] Kerr, 80, 81.
[3] *Smith* v. *Jeyes*, 4 Beav., 503; *Goodman* v. *Whitcomb*, 1 J. & W., 589; *Chapman* v. *Beach*, 1 J. & W., 594; Kerr, 82; High, § 509.
[4] *Supra*.

the hearing it will dissolve the partnership.[1] Inasmuch, however, as the very basis of a partnership is the mutual confidence reposed in each other by the parties,[2] the Court will not, as a matter of course, appoint a receiver even where a case for dissolution is made. "I have frequently disavowed," said Lord Eldon,[3] "as a principle of this Court that a receiver is to be appointed *merely* on the ground of a dissolution of a partnership. There must be some breach of the duty of a partner or of the contract of partnership." When, however, in addition to the fact of a dissolution or right to dissolve some special ground is shown as that the member of the firm against whom a receiver is sought has done acts inconsistent with the duty of a partner and are of a nature to destroy mutual confidence: where there is misconduct forfeiting personal right of intervention in the partnership affairs, such as colluding with the debtors of the firm, carrying on separate trade on his own account with the partnership property, making away with assets, mismanagement endangering the whole concern, possible loss to partnership funds and generally if one of the partners has acted in a manner inconsistent with the duties and obligations which are implied in every partnership contract; in all such cases a receiver will be appointed.[4] The unwillingness of the Court to appoint a receiver at the suit of one member of a firm against another being based on the confidence originally reposed in each other by the parties, the ground of the rule has no longer any place if it appear that the confidence has been misplaced as where a defendant by false and fraudulent representations induced the plaintiff

[1] *Baxter* v. *West*, 28 L. J. Ch., 169; Kerr, 82.

[2] *Phillips* v. *Atkinson*, 2 Bro. C. C., 272; see *Peacock* v. *Peacock*, 16 Ves., 51.

[3] In *Harding* v. *Glover*, 18 Ves., 281.

[4] Kerr, 86, 87, 88.

to enter into partnership. There is also a case for a receiver even although there be no misconduct endangering the partnership assets if one partner excludes another partner from the management of the partnership affairs.[1] "The most prominent point," said Lord Eldon,[2] "in which the Court acts in appointing a receiver of a partnership concern is the circumstance of one partner having taken upon himself the power to exclude another partner from as full a share in the management of the partnership as he who assumes that power himself enjoys."

To entitle the plaintiff to relief, the partnership must be established either by the admission of the defendant or other competent proof as otherwise the sole property of the defendant might be taken from him, his business broken up, while in the end it might appear that there was no right on the part of the plaintiff even to an account. The burden of proof rests, of course, upon the plaintiff. But it would be opening the door to a great deal of wrong to hold that by simply denying the existence of a partnership a party in possession can secure the rejection of an application. In other words, the mere denial by the defendant partner of the existence of a partnership is not sufficient to prevent the appointment when the Court is satisfied from the evidence in support of the application that the partnership relation exists.[3]

The doctrine relating to exclusion is acted upon where the defendant contends that the plaintiff is not a partner, or that he has no interest in the partnership assets.[4] Inasmuch as the Court will not appoint a receiver against

[1] *Ib.*, Beach, § 573.

[2] *Const* v. *Harris*, 1 Turn. & Russ., 496; *see* also *Wilson* v. *Greenwood*, 1 Swanst., 481: but partners may by contract provide for an exclusion in certain cases, *Blakeney* v. *Dufaur*, 15 Beav., 40; High, §§ 523—529.

[3] Beach, § 558; High, § 479; Kerr, 89.

[4] Kerr, 88.

a partner unless some special ground for doing so can be shown, it follows that in a firm of several members there is more difficulty in obtaining a receiver than in a firm of two. For the appointment of a receiver operating in fact as an injunction against the members, there must be some ground for excluding all who oppose the application. If the object is to exclude some or one only from intermeddling the appropriate remedy is rather by injunction than by a receiver.[1] The death or bankruptcy of one of the members of a firm is not of itself a ground for the appointment of a receiver as against the surviving or solvent partner or partners. In such case the right to wind up the concern is vested in the surviving or solvent partner or partners, and before the Court will interfere, some breach or neglect of duty on their part must be established. But the representative of a deceased partner and the assignees of a bankrupt partner are not strictly partners with the surviving or solvent partner or partners. It is consequently a matter of course to appoint a receiver when all the partners are dead, and a suit is pending between their representatives or where such appointment is sought by a partner against the representatives or assignees in bankruptcy of his late co-partner.[2] If the partnership is already dissolved, the Court usually appoints a receiver as a matter of course.[3] The Court has jurisdiction to appoint a receiver of a partnership business with a view to selling the business as a going concern, notwithstanding that the partnership has expired in pursuance of a provision to that effect contained in the partnership-deed.[4]

[1] Kerr, 89.

[2] *Ib.*, 84, 85; High, § 530; Beach, §§ 572, 581, and as to receiver appointed in interest of retiring partner v. *ib.*, § 580.

[3] *Pini* v. *Roncorni*, 1892, 1 Ch., 637.

[4] *Taylor* v. *Neate*, 39 Ch. D., 538.

Lord Langdale described the position of the Court in partnership cases as follows :—"Where an application is made for a receiver in partnership cases the Court is always placed in a position of very great difficulty ; on the one hand, if it grants the motion the effect of it is to put an end to the partnership which one of the parties claims a right to have continued ; and, on the other hand, if it refuses the motion, it leaves the defendant at liberty to go on with the partnership business at the risk, and probably at the great loss and prejudice of the dissenting party. Between these difficulties, it is not very easy to select the course which is best to be taken, but the Court is under the necessity of adopting some mode of proceeding to protect, according to the best view it can take of the matter, the interests of both parties.[1]

Assuming that the Court thinks fit to grant the application, it will appoint the Court Receiver or some other third party or more ordinarily one of the parties themselves to be the receiver. If the partner actually carrying on the business has not been guilty of such misconduct as to have rendered it unsafe to trust him, the Court generally appoints him receiver and manager with security, but without salary, or makes a reference to enquire who shall be appointed, leave being frequently given for each partner to propose himself. A partner who is appointed receiver becomes the officer of the Court and must be regarded accordingly ; but while his appointment protects his operations and gives him power to have recourse to the Court for assistance and advice, it does not enable him to do that which the existing agreements or conventions between the parties do not justify.[2]

[1] *Madgwich* v. *Wimble*, 6 Beav., 500.

[2] Kerr, 91, 92; High, § 540.

The first and principal duty of a receiver in these cases is, as in general in other cases, to collect and reduce to available funds the debts and effects of the partnership, and the partners may be compelled upon his motion to pay over collections made by them prior to his appointment.[1] Unless there be no necessity or it would occasion inconvenience, the order directs the other partners and all other parties to deliver over to the receiver all securities in their hands for such estate or property and also the stock-in-trade, and effects of the partnership, together with all notes and papers relating thereto.

A receiver may, by the order of his appointment, be directed to act personally in the business, to collect the debts and pay taxes and other charges and to sue in the name of the partners. Where one of the partners is appointed receiver and as such makes collections, he has no right to withhold them upon the ground that they are due to him personally inasmuch as such an act would be in violation of his trust. Where the Court has taken possession of property in litigation, and has continued its use for a considerable period, it may, at any time, refuse to go on with the business on account of the inconvenience and unfitness of such a proceeding and direct a sale.[2]

In many cases the appropriate relief will be rather by injunction than by receiver. It does not follow that because the Court refuses to appoint a receiver, it will also decline to interfere by injunction, or that because the Court will grant an injunction it will also appoint a receiver. The Court does not act upon the same principles in granting injunctions and receivers in these cases. For when the Court appoints a receiver of a

[1] Beach, § 585.

[2] Beach, §§ 585-588. *See* High, §§ 538-552.

partnership, it takes the affairs of the partnership out of the hands of all the partners and entrusts them to a manager of its own appointment; whereas in granting an injunction the Court does not take the affairs of the partnership into its own hands, but only restrains one or more of the partners from doing what may be complained of. The order for a receiver excludes all the partners from taking any part in the management of the concern; whereas the order for an injunction merely restrains one of the partners who may have acted in breach of the partnership articles, or may have otherwise misconducted himself from continuing to act in the way complained of.[1]

Trusts.

The appointment of receivers is frequently necessary in cases of trusts either express or implied as against trustees and persons occupying fiduciary relations. A large number of cases may be cited and digested under other titles which involve a receivership of trust property. Such cases are properly here dealt with as illustrate or elucidate some phase or other of the subject as specially modified by the consideration that the property of which the receiver was appointed was property affected by a trust. So, strictly speaking, many of the cases in which relief is granted by appointing a receiver over corporations are dependent to a considerable degree upon the doctrine of trusts, the officers of a corporation occupying a fiduciary relation towards its shareholders and creditors, and the abuse of their trust constituting a frequent ground for interference. The subject is here considered in its application to cases of express trusts, such as those created under wills, cases of executors and administrators of infancy and lunacy.[2] The jurisdiction is not, however,

[1] Kerr, 77-78. *See* Author's Law of Injunctions, 272-277.

[2] High, § 692; Beach, § 589.

confined to cases of express trust. In the case of misconduct by trustees the Court will appoint a receiver as well where the trust arises by implication as where it is expressed. So where a testator had bequeathed the residue of his estate to his widow, stating in his will that he had done so "in perfect confidence that she will act up to those wishes which I have communicated to her in the ultimate disposal of my property after my decease," the Court being satisfied on the evidence that the bequest had been made on the faith of a promise made by her that she would dispose of the property in favour of the plaintiffs, the natural children of the testator, and that an implied trust was accordingly raised in their favour granted a receiver of the estate on the death of the widow against the heir-at-law of the real estate and the second husband of the widow.[1] And where a tenant for life of leaseholds is bound to renew, he is in such case clothed with the character of a trustee; and if by his threats or acts he manifests an intention to suffer the lease to expire, the Court will appoint a receiver in order to provide a fund for renewal.[2]

In general it may be stated that the Courts are averse to the displacement by a receiver of a trustee under an express trust unless for good cause shown, the underlying principle being that the estate has been vested in the trustee by the creator of the trust, and it is for him to say in whom the administration of the trust shall be reposed. Even in the days of separate jurisdictions Courts of Equity were no more inclined to exercise their power, whereas in the case of trusts they had exclusive jurisdiction than in other cases, it being held that there

[1] *Podmore* v. *Gunning*, 7 Sim., 644.

[2] Kerr, 22: see *Bennett* v. *Colley*, 2 M. & K., 233.

must appear the same substantial grounds for the exercise of the jurisdiction in these cases as in those in which the cause of action was one peculiarly at law. And this was held to be especially the rule in the case of express trusts on account of the confidence reposed by the donor in the trustee.[1] So, as a general rule, the poverty or insolvency of a trustee, especially if it existed at the time of the appointment is not a ground for a receiver, unless there be in addition thereto some danger or loss to the estate ;[2] for the creator of the trust selected his trustee with knowledge of such facts. But an actual adjudication presents much stronger ground for relief, and if a sole executor or trustee becomes bankrupt there is a case for the appointment of a receiver on the ground that there is no person to protect the assets, the assignees of the bankrupt having no power to interfere with the trust estate.[3] On the same principle it is no sufficient ground that one of several trustees has disclaimed : for such disclaimer does not affect the estate of the others, and the creator of the trust must be presumed to know what the legal consequences of the death or disclaimer of some of them must be.[4]

Where, however, a proper case is shown to exist the Court will interfere. The general ground upon which a receiver is appointed in this class of cases is that the trust estate is in danger because of the waste, misconduct or mismanagement of the trustee. A receiver will be granted if there is any danger of loss, improper disposition of assets, improper management, breach of trust, omission to perform, bias in favour of one of the contending parties, denial of the trust, refusal to pay

[1] Beach, § 589.
[2] *Ib.*, § 600.
[3] High, § 711 ; Kerr, 18 ; *Steele* v. *Cobham*, L. R., 1 Ch. App., 325 ; *Re Johnson*, 1 Ch., 325 ; *Re Hopkins*, 19 Ch. D., 61.
[4] Kerr, 15, 16.

and removal from the jurisdiction, fraud, refusal to act, unfitness, withholding of trust funds; where some of several trustees are acting separately and against a dissentient trustee; where the trustees cannot act through disagreement and the like. But it is not sufficient that the trustees are poor or in mean circumstances, or that one of several trustees is inactive or has gone abroad.[1] So where land was devised to a trustee to hold and manage it, and to pay the rents and income to certain beneficiaries, the insolvency of the trustee and his misapplication of the proceeds of sales of the property and his failure to apply the income in accordance with the terms of the trust and his appropriation of such income to his own use was held to be ground for the appointment of a receiver in an action by the beneficiaries for an accounting.[2]

In general it may be stated that while the Court will, in a proper case, dispossess a trustee of the trust estate by appointing a receiver, it will not do so on slight grounds, it being for the creator of the trust and not for the Court to say in whom the trust for the administration of the property shall be reposed. A strong case must be made out to induce the Court to dispossess a trustee who is willing to act; and if there be no danger to property, and no fact is in evidence to show the necessity of interfering by appointing a receiver, the Court will not appoint one. The application must be based upon an abuse of trust, or such conduct upon his part as leads to the conclusion that an abuse is imminent.[3]

A receiver may, of course, be appointed if all the *cestui que trustent* and the trustee consent, or if one of several trustees disclaims and the other trustee consents.

[1] Kerr, 16-22; High, §§ 694-697; Beach, §§ 589-593; *et ibi casas.*

[2] *Allbright* v. *Allbright*, 91 N. C., 220 (Amer.).

[3] Kerr, 15; Beach, § 597.

Executors and administrators.

The same principles apply where application is made to appoint a receiver of property in the possession of an executor. The jurisdiction, though well established, is nevertheless exercised with caution, and the Courts are averse to granting relief, unless in pressing cases, since it is for the testator to say in whom the management of his estate shall be vested after his decease. The executor will not be displaced upon slight grounds, and a strong case must be made out to warrant the appointment of a receiver where the executor is willing to act. Where, however, the circumstances above-mentioned exist such as would justify the appointment as against a trustee and where the abuse of trust is manifest, and it is plainly apparent that there has been serious waste and misappropriation of the funds, relief will be granted ; especially is this true when the mismanagement is shown not in a single instance but from an habitual course of dealing, involving the property in danger. The Court in such cases treats an executor like any other trustee, and will take from his hands the management of the trust if he has been guilty of waste and gross mismanagement.[1] It is not sufficient that the executors are poor or in mean circumstances ; and though if a testator has selected an insolvent debtor as his executor with full knowledge of his insolvency, the Court will not on that bare fact alone interfere ;[2] yet bankruptcy of a sole executor is a ground ;[3] and it will not be inferred from the circumstances of the will having been made some time before the insolvency, and not altered afterwards, that the

[1] High, §§ 706-708; Kerr, 15. *Hafizabai* v. *Kazi Abdul Karim*, I. L. R., 19 Bom., 83, 85 (1893).

[2] *Gladdon* v. *Stoneman*, 1 Madd., 143*n*; *Stainton* v. *Carron Co.*, 18 Beav., 146, 161; High, § 709; the case is, however, different if an executor or administrator be proved to be of bad character, drunken habits and great poverty: *Everett* v. *Prythergh*, 12 Sim., 368.

[3] v. *ante*.

testator had a deliberate intention to entrust the management of his estate to an insolvent executor ;[1] and the practice of not appointing a receiver where a testator has selected as his executor an insolvent debtor, with knowledge of his insolvency, has not gone so far as to permit a person against whom there is evidence of insolvency, to prevail against creditors claiming to have the property secured for their benefit, when it is not more than sufficient to pay them.[2] If a sole executor resides abroad or be abroad, and the beneficiaries are unable to obtain an account from the person left in control of the property during the executor's absence a case is made out for a receiver.[3] The principles governing these cases and the nature of the evidence required are clearly stated in the judgment of the Court in the case of *Haines* v. *Carpenter*[4] in which Woods, J., said:—

"The party in possession of the property for which a receiver is asked is the executor named in the will of the testatrix, who has qualified in the probate Court and given bond for the faithful discharge of his trust. Under these circumstances, the Court should not displace him upon light grounds. And though a suit be instituted by a party having an interest in the estate it does not follow that the trust created by the testator is to be set aside. A strong case must be made out to induce the Court to dispossess a trustee or executor who is willing to act. The grounds upon which this Court is asked to dispossess the executor and turn over the property of the succession to a trustee, are that Carpenter, the

[1] High, § 711; *Langley* v. *Hawk*, 5 Madd., 46.

[2] *Oldfield* v. *Cobbett*, 4 L. J. Ch. N. J., 272.

[3] Kerr, 20; *see* as to the removal of an executor or the trust estate from the jurisdiction, Ex parte *Galluchat*, 1 Hill Eq., 148 (Amer.), cited in High, § 712.

[4] 1 Woods, 262 (Amer.), cited in High, pp. 664, 665.

executor, is unfit and incompetent to manage and successfully control the estate ; that he has only cultivated a part of the land susceptible of cultivation, when, in the opinion of the complainants, all of it should have been cultivated ; that he is endeavouring to defeat the bequest to the said Baptist Church by depreciating the value of the estate, and that he is confederating with said Elias S. Dennis to institute fictitious suits against the estate, in order to sweep away its assets. These charges are not directly made, but are stated on the information and belief of complainants, and they are not supported by a single affidavit to any fact. The application to appoint a receiver must be supported by evidence showing that the appointment is necessary. There is absolutely no testimony to support the application in this case. It is true that one of the complainants swears to the bill, but in doing so he only swears that he has been informed of and believes certain statements in his bill. This is not evidence, and gives no support to the application. The fact is that the Court is asked to appoint a receiver, in this case, on mere rumour, without any proof showing the necessity of the appointment. But even if the fact were established that the trust property was in danger, that, of itself, would not be sufficient. It must be further shown that the party in possession is irresponsible. There is no proof that the executor is irresponsible, or his bond insufficient, nor is there any averment in the bill to that effect. The motion for a receiver must, therefore, be overruled."

The rules of the Court of Chancery adverted to have been held not to be applicable to the case of an executor of the will of a Mahommedan. In England, where those rules prevail a testator by his will disposes of what is absolutely his among the objects of his bounty ; he has, therefore, a right to choose who shall distribute that

bounty among those who can claim only under the will. But a Mahommedan testator cannot bequeath more than one-third of his property, in any case without the consent of his heirs, and the executor has not only to distribute that one-third among the legatees, but also the remaining two-thirds amongst the heirs who claim adversely to the will; consequently there is not the same reason why the appointment of a Mahommedan testator of an executor should receive the same consideration as the appointment of an executor by an English testator does in England.[1]

In the same case it was held that a suit by the testator's widow for administration of the estate was sufficiently well constituted for the purpose of a motion for a receiver, although only the executor who had acted was made defendant, the other two executors not being parties to the suit. The Court, however, expressed no opinion as to whether it might not be necessary, or at any rate advisable, to add the other two executors as defendants before the suit came in for hearing.

The case of an administrator is different from that of an executor in that the latter is a person fixed upon by the testator himself, whereas the former is merely the next-of-kin or other person entitled in intestacy taking his grant from the Court. For these reasons the above-mentioned rules do not apply, and it is stated that in the instance of an administrator the Court does, upon a slight case, appoint a receiver.[2] It would be probably more correct to say that while in this, as in all other cases, sufficient ground for relief must be shown, yet the case which is required, is not the strong case which must be shown when the appointment is desired as against an executor.

[1] *Hafizabai* v. *Kazi Abdul Karim*, I. L. R., 19 Bom., 83, 85 (1893).

[2] Bennet, 33, but *see* Beach, § 596.

Infancy.

The properties and interests of infants were under the peculiar and exclusive care of the Court of Chancery, it being a long established rule that infants are to be favoured in all things which are for their benefit, and not prejudiced by anything to their disadvantage.[1] The property of infants is generally vested in, or in the possession of, guardians and trustees. It has been held that guardians appointed by will under the statute in that behalf are but trustees, and that if it appear that the estate of an infant is likely to suffer by the conduct of his guardian, the Court will interfere and appoint a receiver upon the same principles upon which it interferes in the case of trustees and executors.[2] The Court will, upon a proper case being made out, protect (even against the father if the latter be insolvent, or of bad character, or there be danger of loss) the estate of an infant by appointing a receiver and will consider chiefly what would be most beneficial to his interests. If there be no testamentary guardian, or the latter declines to act, a receiver will be appointed on a proper case being made out.[3] The appointment of receivers for the protection of the property rights of infants, as against executors or other persons occupying fiduciary relations towards the infant's estate, rests upon the general doctrine of trusts already discussed and is governed by the same general principles. The necessity of protecting an infant's property and estate, when it is not vested in a trustee, but is in the adverse possession of a person hostile to the infant's interests, may afford sufficient ground for the interference of equity by a receiver. So where an infant bought goods and mortgaged them to secure payment, and, upon

[1] Bennet, 26.

[2] *Duke of Beaufort* v. *Berty*, 1 P. W., 704; Kerr, 14.

[3] Kerr, 13, 14.

default, the mortgagee took possession of them and also of other property which he was about to sell, a receiver was allowed the infant in an action to disaffirm the contract.[1] As regards the selection of a proper person to be appointed receiver, it is generally held that one who sustains a relation of trust towards the infant is ineligible as receiver, the two characters being incompatible.[2]

It was formerly considered that in the case of infants the Court had jurisdiction on petition to pronounce an order for a receiver as well as for guardian and maintenance : but it was held by Lord Hardwicke that the Court had not jurisdiction to appoint a receiver unless a cause be depending :[3] and the same rule exists under the Code. A receiver appointed for the protection of the estate of infants will not be discharged until the object of his appointment has been fully attained. Thus, as between tenants in common of real estate, two of whom are infants, when a receiver is appointed for the protection of the infants, with directions to pay to the adults their share, he will not be discharged upon the application of one of the infants on his coming of age, the other not yet having attained his majority.[4]

Lunacy.

A receiver is sometimes necessary for the preservation of the estate of a lunatic. Though the jurisdiction is unquestioned, it is so seldom exercised that it is unnecessary here to do more than to refer to the authorities and cases dealing with the subject.[5]

Cases of disputed title.

§ 21. According to the English decisions if a right was asserted to property in the possession of the defendant

[1] High, §§ 725, 728; Beach, § 598.

[2] *Sykes* v. *Hastings*, 11 Ves., 363 ;——v. *Jolland*, 8 Ves., 72 ; High, § 729.

[3] Bennet, 3; Ex parte *Whitfield*, 2 Atk., 315.

[4] *Smith* v. *Lyster*, 4 Beav., 227 ; Bennet, 3.

[5] Kerr, 93-96; Beach, § 599 ; High, §§ 733-736.

claiming to hold under a legal title, the Courts did not interfere by appointing a receiver unless a very strong case was made out.

The Court of Chancery would not, at the instance of a person alleging a mere legal title against another party who was in possession of *real* estate[1] and who also claimed to hold by a like legal title, disturb that possession by appointing a receiver, but left the claimant to his remedy at law to have his title declared. The Court would not interfere with a legal title unless there was some equity, and unless in cases of absolute destruction, waste and imminent danger, or where the contest lay between a person having a clear title and one without any reasonable appearance of title and the like. It would, however, interfere if a good equitable case were made out; if it was satisfied that the relief prayed for would be given at the hearing; or if there was fraud, undue influence, gross inadequacy of consideration, abuse of trust by trustees, executors and the like.[2]

The principles laid down by those decisions have been held applicable to this country in a case[3] which may be

[1] Though the Court would interfere to protect personal estate pending litigation as to probate, the case was different with real estate (Kerr, 99), a distinction which has no force as an arbitrary rule in this country: see *Carrow* v. *Ferrier*, 3 Ch. App., 719.

[2] Kerr, 99-102 *et seq.*, and see *Talbot* v. *Hope Scott*, 4 K. & J., 96, a leading case; High, §§ 554, 557.

[3] *Sidheswari Dabi* v. *Abhoyeswari Dabi*, I. L. R., 15 Cal., 818 (1888); followed in *Chandidat Jha* v. *Padmanund Singh Bahadur*, I. L. R., 22 Cal., 459, 464, 465 (1895). In *Sree Ram Das* v. *Mohabir Das*, I. L. R., 27 Cal., 279 (1899), the Court referring to the decision of Macpherson, J., sitting on the original side of the Court in *Sham Chand Giri* v. *Bhairam Pandey* (unreported), observed that the learned Judge in that decision seemed to have taken a less strong view of what was necessary to justify an appointment than in the preceding case. *See* also *Prosonomoye Devi* v. *Beni Madhub Rai*, I. L. R., 5 All., 561. The rule is not to displace a *bonâ fide* possessor from any of the just rights attached to his title unless there be some equitable ground for interference. *See* also *Gossain Dulmir Puri* v. *Tekait Hetnarain*, 6 C.L.R., 467, 469 (1880)

taken to be the leading one on this subject, and in which the judgment[1] of the Court (Macpherson and Gordon, JJ.) was as follows :—

Sidheswari Dabi v. *Abhoyeswari Dabi.*

"This is an appeal from an order of the Judge of the Assam Valley Districts appointing a receiver of a large property which is the subject of a pending suit. The plaintiff in this suit is a widow of the Rajah of Bijni, who died on the 9th of March 1883, and she claims the entire estate of the Rajah on the ground that the defendant, who claims to be the elder widow, was not married to the Rajah, and that, even if she was married, she has forfeited her rights by unchastity both before and after the Rajah's death. She further, in the alternative, claims a moiety of the estate as co-heiress with the defendant, or, should the defendant's exclusive title be established, that a suitable sum for her maintenance should be fixed and made a charge on the property. The appointment of a receiver is asked for on the ground that the defendant has grossly mismanaged the property, and has wasted, and would continue to waste, large sums of money. The defendant contends that she is, and has been since the Rajah's death, in exclusive possession of his property under a title admitted on more than one occasion by the plaintiff herself that she was legally married to the Rajah, and as elder widow is his sole heiress, the estate being an impartible raj to which the ordinary rules of the Hindu law of succession are inapplicable. It is further generally contended that the claim is not made *bonâ fide*, and that it has no substantial foundation.

Now we must regard the defendant as in exclusive possession of the property claimed. She is the sole registered proprietor ; and it is clear that ever since the

[1] *Sidheswari Dabi* v. *Abhoyeswari Dabi*, supra at pp. 821, 823.

Rajah's death, which occurred more than four years prior to the institution of the suit, she has put forward the title which she now asserts. It is admitted in the plaint that the defendant was allowed to assume the entire management, though the admission is qualified by the assertion that the management was understood to be on the plaintiff's behalf. With this and with the allegations of fraud and immorality we shall deal hereafter ; it is enough now to say that on the facts before us we must consider that possession followed the management, and if the possession has been disturbed, the disturbance has been by the plaintiff.

"Both the Deputy Commissioner and the Judge seem to think that it is sufficient to justify the appointment of a receiver if the allegations of the plaintiff show a sufficient cause of action, and if the management of the estate has been and is such as to render the appointment expedient. Section 503 of the Civil Procedure Code certainly gives a wide discretion to the Court. It empowers the Court to appoint a receiver whenever it appears to be necessary for the realization, preservation, or better custody or management of any property the subject of a suit. This power is not, however, greater than that exercised by the Courts in England ; and it must, we think, be exercised on the same principle, that is to say, with a sound discretion on a view of the whole circumstances of the case, not merely the circumstances which might make the appointment expedient for the protection of the property, but all the circumstances connected with the right which is asserted and has to be established. If a right was asserted to property in the possession of the defendant claiming to hold under a legal title, the Courts did not interfere by appointing a receiver unless a very strong case was made out. The principles to which we refer are stated in Kerr

on Receivers,[1] by Lord Cranworth in *Owen* v. *Homan*,[2] and in *Clayton* v. *The Attorney-General*.[3] We see no ground for the contention that those principles are not applicable in this country. They were adopted to prevent a wrong to the defendant, which might equally be done here if they were not followed. It was indeed conceded that the plaintiff must at least show that her claim is honest and well-founded, and if she must show that much, it is a mere question of degree as to how far she must make out her case. Nor is there anything in Mr. Bose's argument that the principles referred to have been relaxed since the passing of the Judicature Act of 1873. It is only necessary to refer to the judgment of Brett, L.J., in *North London Railway Co.* v. *Great Northern Railway Co.*,[4] and the dicta of learned Judges in other cases therein referred to. Those were cases of injunctions; but the words "just or convenient," which limited the power of the Court, applied also to receivers.[5]"

The Court then observed that it was necessary therefore to consider the circumstances under which the claim was made, the evidence by which it was supported and the conduct of the parties, and after a consideration of these and other facts in the case held that the order for a receiver ought not to have been made and set it aside and decreed the appeal.

In the decision in which the last case was referred to and followed, the Judges further observed that the lower Court did not appear to have kept in view the distinction which exists between the case of an injunction and that of a receiver. "That distinction" they said, "seems to be

[1] 2nd Ed., p. 3.
[2] 4 H. L. C., 997, 1032.
[3] Cooper's cases in Chancery, vol. I, p. 97.
[4] L. R., 11 Q. B. D., 30.
[5] *Sidheswari Dabi* v. *Abhoyeswari Dabi*, I. L. R., 15 Cal., 821-823 (1888).

that, while in either case it must be shown that the property should be preserved from waste or alienation; in the former case it would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged; while in the latter case a good *primâ facie* title has to be made out."[1]

It has been said that the principles referred to in the English decisions prior to the Judicature Act of 1873, have not been relaxed since the passing of that Act,[2] but this, it is submitted, is not strictly and in all respects so. Though, as heretofore, a strong case will in general be required, the jurisdiction of the High Court has been so much enlarged by the Judicature Act that receivers will now be appointed on behalf of persons claiming against a legal title in cases in which the Court of Chancery could not have made the appointment.[3] What must be shown to obtain relief must of course differ in each case, but in England it must be shown that the appointment is "just or convenient" and in this country that it is "necessary" for the realization, preservation or better custody or management of the property, and the necessity will only exist where the applicant has a strong case or at any rate a good *primâ facie* title to the property sought to be protected.

The discretion conferred upon a Court to appoint a receiver interferes to some extent with the sacrosanct position which heretofore the defendant in an ejectment action has occupied. The exercise of the discretion will practically in many instances compel the defendant to give up to some extent the advantages which he

[1] *Chandidat Jha* v. *Padmanand Singh Bahadur*, I. L. R., 22 Cal., at p. 465.

[2] *Sidheswari Dabi* v. *Abhoy-eswari Dabi*, I. L. R., 15 Cal. at p. 823.

[3] Kerr, 102, 103, and cases there cited.

formerly possessed and to disclose that which he has been protected from disclosing, *viz.*, his defence ; for it would be very difficult for the defendant resisting an application of this kind to keep silence as to his own title. But the Legislature must be taken to have contemplated the result that an application for a receiver may practically compel the defendant in an action of ejectment to disclose his title. The Court has a discretionary power to appoint a receiver whenever it appears to be just and convenient, and this power may be exercised where the plaintiff is seeking to recover land by a legal title ; the discretion must be exercised with a view to all the circumstances of the case. Among other things, it is important to bear in mind the position of the tenants, who, if the defendant is not a person of undoubted solvency and remains in receipt of the rents may be called upon to pay twice over if the plaintiff succeeds. The Court has also to consider the probability of the plaintiff's succeeding and the length of the defendant's possession, and whether he has any *primâ facie* title; where, therefore, the plaintiff in an action of ejectment sought to recover land by a legal title, and the title of the defendant who was a person of small means appeared to be shadowy and the plaintiff's title appeared to be satisfactorily made out subject to a point on the construction of a will which the Court considered very unlikely to be decided against him, it was held that a receiver ought to be appointed.[1]

[1] *John* v. *John*, L. R., 2 Ch. (1898), 573 : *per* Collins, L. J., "it seems to me that the essential matter is what view the Court takes as to the probability of the plaintiff's success. We cannot decide the case now because it must be decided at the trial ; but we ought not to avoid forming an opinion upon the materials before us, and I think that though the conclusion is not final, it is a conclusion upon which we are bound to act;" referred to in *Sangappa* v. *Shivbasawa*, I. L. R., 24 Bom., 38 (1899).

Miscellaneous.

§ 22. The question of debt arising out of simple and other contracts will be found subsequently dealt with. Receivers will, when necessary, be appointed as between vendors and purchasers either in connection with proceedings to compel a specific performance or for the protection of the rights of a purchaser after sale. So the vendor of real estate upon a bill against the vendee for specific performance of the contract of purchase may have a receiver in aid of his action when it is shown that the defendant is insolvent and that all his property including the estate which is the subject of the contract is about to be conveyed to trustees for the benefit of his creditors.[1] So also when a person has contracted for the purchase of real estate, but is dissatisfied with the title and refuses on that ground to conclude the purchase, in an action against him to enforce specific performance, a receiver may be appointed for the management of the property pending a reference to determine the validity of the title.[2]

Contract, covenant, conveyance.

Sales.

The relief in the class of cases under consideration is not confined to actions by the vendor, but the jurisdiction is also exercised on behalf of the vendee instituting such an action. And upon a bill by the vendee to compel specific performance of the contract of sale a receiver may be appointed to secure the property *pendente lite* when the vendor has fraudulently repossessed himself of the property.[3] Nor is the relief confined to cases of specific performance. Accordingly where on a bill impeaching a sale of land on the ground of fraud and alleging gross inadequacy of consideration and undue influence taken of the ignorance of the vendor, the Court being of opinion from the materials before it, that it was hardly

[1] *Hall* v. *Jenkinson*, 2 Ves. and B., 125; *see* High, § 609, *et seq.*; Kerr, 70-73.

[2] *Boehm* v. *Wood*, 2 S. and W., 236.

[3] *Dawson* v. *Yates*, 1 Beav., 301.

possible the transaction could stand at the hearing, a receiver was appointed in a suit instituted against the devisees of the property charged with fraud.[1] And where it appeared that the defendants had obtained the conveyance of the legal estate from the plaintiff upon a strong suspicion of abused confidence a receiver was appointed.[2]

Leases.

Where a party is clothed with title and possession by a lease in writing, and is in the enjoyment of rights apparently legal, a receiver will not be appointed unless under some urgent and peculiar circumstances, and the burden is upon the plaintiff to show a clear right in such a case or a *primâ facie* right with such attending circumstances of danger or probable loss as will move the conscience of the Court to interfere. The mere fact of the difficulty of enforcing the ordinary legal remedies to compel the payment of rent due is not in itself a sufficient reason for appointing a receiver. A receiver will be appointed where the term has expired and the tenant who is insolvent withholds possession: and where a receiver has been appointed over a leasehold interest and the term expires, it has been held that the landlord may re-enter into possession without first obtaining the leave of the Court.[3]

Covenant.

The Court will interfere in cases between covenantor and covenantee and appoint a receiver where a fair *primâ facie* case is made out for the specific performance of the covenant.[4] So where the defendant on an advance of money being made to him, agreed to execute a mortgage of certain lands but afterwards refused to perform his agreement and there was an arrear of interest due on the

[1] *Stillwell* v. *Wilkins*, Jac., 282.
[2] *Huguenin* v. *Basely*, 13 Ves., 107.
[3] Beach, § 496.
[4] Kerr, 73-75.

money advanced, on bill for specific performance, the motion for a receiver was granted.[1]

Debtor and creditor.

Creditors may be general, that is, creditors having no right to resort to any particular property of their debtor for satisfaction of their claim: creditors having a right against some specific fund or estate; and judgment-creditors. According to the majority of the decisions of the American Courts the jurisdiction will not be exercised in favour of mere general creditors whose rights rest only in contract and are not yet reduced to judgment and who have acquired no lien upon the property of the debtor. These Courts will not permit any interference with the right of a debtor to control his own property, at the suit of creditors who have acquired no lien thereon, it being held that whatever embarrassment a creditor may experience by reason of the slow procedure of Courts of law must be remedied by legislative and not by judicial authority. And while there are a few instances where the Courts have maintained a contrary doctrine, the great weight of authority supports the rule, that in the absence of statutory provisions to the contrary a general contract creditor before judgment is not entitled either to an injunction or a receiver against his debtor upon whose property he has acquired no lien.[2]

As regards injunction no doubt the ordinary rule is that, pending a suit to enforce a general claim against a person, there cannot be an injunction to restrain him from parting or dealing with his property, not being property specifically in dispute in the suit;[3] when, however, such intended parting and dealing with property is not done in the *bonâ fide* exercise of ownership but with an intent

[1] *Shakel* v. *Duke of Marlborough*, 4 Madd., 463.

[2] High, § 406.

[3] *See* Author's Law of Injunctions, Ch. V, and p. 199; *Robinso* v. *Pickering*, 16 Ch. D., 606.

to defraud persons, who, being creditors of the owner, have or might have the right to resort to such property in satisfaction of their claim, there arises in their behalf an equity to restrain such threatened dealing with the property even as against its legal owner, and in this country an application may be made for an injunction under section 492 (*b*) or for an attachment before judgment under section 483 of the Civil Procedure Code. Nextly as to receivers the Court has power under section 503 to appoint, as the English Courts have done,[1] a receiver at the suit of a general creditor over the property of a debtor provided that the existence be shown to the Court of circumstances creating the equity on which alone the jurisdiction arises. Though general creditors may, like specific appointees of property, have a receiver of the property of the debtor, a strong case must be made out to warrant the interference of the Court. The Court will not, unless a clear case be established, deprive a person of property in which the claimant has no specific claim, in order that if he establish his claim as a creditor there may be assets wherewith to satisfy it. The chance of doing wrong to the defendant in such a case is certainly much greater and more apparent than when a right asserted is a right against some specific fund or estate.[2] The jurisdiction will probably be rarely exercised in these cases having regard further to the provisions of the Code relating to attachment before judgment and injunction already mentioned.

As regards the second class of creditors, the English authorities show that quite independently of the Judicature Act, 1873, if a plaintiff had a right to be paid out of a

[1] Kerr, 42; High, § 418. Kerr, 43-44.
[2] *Owen* v. *Homan*, 4 H. L., 1036;

particular fund he could in equity obtain protection to prevent that fund from being dissipated so as to defeat his rights. He might not have had a specific charge on the fund so as to give him priority, but it was settled that a person who had a right to be paid out of a particular fund could obtain an injunction, and if an injunction it followed on principle that he could obtain a receiver in a proper case to protect the fund from being misapplied. The introduction of section 25 of the Judicature Act did not curtail the power of the Court to grant injunctions or to appoint receivers: it enlarged it. It has not revolutionised the law, but it has enabled the Court to grant injunctions and receivers in cases in which it used not to do so previously.[1] Creditors even before judgment may have such a special or equitable charge or lien upon the debtor's property as to entitle them to a receiver.[2] If the real estates over which a receiver is sought are on mortgage, but the mortgagee is not in possession, a receiver will be appointed on the application of creditors without prejudice to the right of the mortgagee to take possession.[3]

Lastly receivers were appointed in aid of judgment-creditors. In appointing a receiver in aid of a legal judgment for a legal debt, the Court of Chancery, it has been very commonly said, granted equitable execution. But the expression is not correct. The appointment of a receiver is not execution, but is equitable relief granted under circumstances which made it right that legal difficulties should be removed out of the creditor's way. What a judgment-creditor got by the appointment of a receiver was not execution but equitable relief which was granted

[1] *Cummins* v. *Perkins*, 1 Ch. (1899), 16, 19; *per* Lindley, M. R.

[2] High, § 408.

[3] *Bryan* v. *Cormick*, 1 Cox, 422; as to the rule when receivers are appointed at the suit of equitable creditors, see *Davis* v. *Duke of Marlborough*, 2 Sw., 137-38.

on the ground that there was no remedy by execution at law: it was a taking out of the way a hindrance which prevented execution at law.[1] Receivers in aid of judgment-creditor's suits was one of the most important class of cases in which a receiver was appointed by Chancery. The fundamental principle upon which it rested was the inadequacy of the legal remedy and the consequent necessity for the aid of equity to supplement the remedy at law. A judgment-creditor who had sued out a writ of *elegit* or *fi-fa* on his judgment but found himself precluded from obtaining execution at law on the ground that the debtor had no lands, goods, or chattels out of which the judgment could be satisfied at law had a right to come to the Court of Chancery for the appointment of a receiver of the proceeds of the estate of the debtor which could be reached in equity. The Court before exercising the jurisdiction required to be satisfied of two things, first that the plaintiff in the action had tried all he could to get satisfaction at law; and then that the debtor was possessed of that particular interest which could not be attached at law. If there was a legal remedy the Court would not interfere. The Court would not appoint a receiver merely because under the circumstances of the case it would be a more convenient mode of obtaining satisfaction of a judgment than the usual modes of execution. Nor has the Judicature Act given any right to have a receiver appointed against the estate of a legal debtor where there is no difficulty in obtaining execution at law.[2] In this country where the Courts are both Courts of equity and common law equitable execution in the sense above indicated does not exist. The Court may by the provisions of section 503 of the

[1] *Re Shephard*, 43 Ch. D., 131. XVII; Kerr, 45-56.
[2] High, Ch. XII; Beach, Ch.

Code however, appoint a receiver of property under attachment in aid of the usual forms of execution prescribed by the Code.[1]

Mortgages.

The instances in which receivers have been appointed in case of mortgages may be divided into two classes : *viz.*, those in which the appointment has been made as between mortgagor and mortgagee, and those in which it has been made as between mortgagees. With regard to the first class the application may be made either by the mortgagor or the mortgagee.

Ordinarily there can be no question of an appointment of a receiver at the instance of a mortgagor who retains possession. There is, however, an early English case in which a receiver was appointed upon the application of one of several mortgagors, in order to keep down the interest on the mortgage, and this was done in the face of opposition by the mortgagee, who had not taken possession of the premises.[2] When a mortgagee has lawfully taken possession there must be, in order to authorise a Court to interfere, some equitable ground such as fraud or imminent danger to the property, mismanagement or the commission of waste or the like ; and where all the mortgagee's doings are within the scope of his powers a receiver will not be appointed.[3] To justify an appointment of an *interim* receiver in a redemption suit there must be strong evidence of imminent danger of the property being lost.[4] It may be generally stated that the possession of the mortgagee is not easily interfered with.[5]

[1] *See* Chapter IV, *post*.

[2] *Newman* v. *Newman*, cited in 2 Bro. C. C., 92, n. 6.

[3] Beach, § 542 ; High, § 654.

[4] *Tribhoban* v. *Jamuna*, Bom. P. J., 184 (1889) ; *see* Rash Behary Ghose's Law of Mortgage, 3rd Ed., 910.

[5] *Ib.*; *see* also Author's Law of Injunctions, 288 *et seq*.

In a suit upon a mortgage, the mortgaged property was directed to be sold and the time of grace had expired. An application was then made by the judgment-debtor to the Court of execution for the appointment of a receiver under section 503, both as regards the mortgaged property as well as other properties belonging to the judgment-debtor. *Held*, that the Court had no power to appoint a receiver of properties other than the subject-matter of the suit, and as regards the mortgaged property, a receiver could not be appointed on the mere ground that the property would not fetch so much by forced sale as it would by sale under a private contract.

Latafut Hossein v. Anunt Chowdhry.

In the judgment,[1] the Court after dealing with the question of jurisdiction observed as follows :—

"As all questions which arise in this proceeding have been argued, we think it would be better to dispose of the other questions. In the first place this application, we think, must fail as being one with which section 503 can have no concern. It is really an attempt made by the applicants to obtain all the benefits of the insolvency procedure of the Code without any of its burdens. They wish the Court to collect together all their property, wherever it may be found, and in as easy a manner to them as may be possible to liquidate their debts without reference to the urgency or otherwise of the claims of the debtors. They do not desire to place themselves in the position of being examined and having to prove the matters which ordinarily would give them a right to relief under the insolvency provisions of the Code. It is likely also that they are not desirous, although the nature of their application to us shows that they are insolvents, of being styled such. Moreover, it

[1] *Latafut Hossein* v. *Anunt Chowdhry*, I. L. R., 23 Calc., 517 (1896).

has not been shewn to us how, even apart from the objection of jurisdiction and the objections to which we have referred, the order of the Court is in any way necessary for the realization, preservation or better custody or management of the property. As far as the mortgaged property is concerned, it is about to be realized in the way provided by law for that purpose. It is unnecessary to preserve this property, and with regard to its better custody or management, it is not established that it is likely to be injured at all. The only case made is that this is an old family ; and that, unless the Court steps in and saves them from their debts and the consequences of their debts, they may be ruined. It is not the business of the Courts, and they have no power whatever to act in cases of this kind where persons are unable to pay their debts. The remedy given is that given by the insolvency provisions of the law. This is enough to say with regard to appeal No. 111.

" As regards appeal No. 112 it appears that, after the judge had held that he had no jurisdiction, the parties applied to the subordinate judge in one of the mortgage suits, asking him to appoint a receiver of the property, the subject of the mortgage, as well as of other property, not the subject of the mortgage. The learned subordinate judge on the merits refused this application, and we think he was right in so doing. In the first place, so far as the other property is concerned, it is clear that he had no power whatever to appoint a receiver of it ; and with regard to the mortgaged property there was no reason whatever why the mortgagee should in any way be impeded in the execution of his decree. The property had been directed to be sold, the time of grace had expired, and there was no reason whatever, as far as we can see, why the mortgagee should not be entitled to have

the property sold and the amount of his debt paid. Again, with regard to this application there is nothing in the words of section 503 which could have any bearing upon it. It was not necessary for the realization of the property. The property was to be sold in the ordinary way. It might be that it fetched less than it would have fetched, if it had been sold by private contract; but it was to be sold in the best way the Court could sell it. If we were to assent to an application of this kind, the result would be that in any case a judgment-debtor could require that a decree be not executed in the manner provided by law, but that that a receiver be appointed. There is nothing to distinguish this case from any other case, where the judgment-debtor says that a property will not fetch so much by a forced sale as it will by a sale under a private contract. We think that the lower Court was quite right in what it did, and that this appeal, like appeal No. 111, must be dismissed, but without costs."

The jurisdiction of equity by the appointment of receivers over mortgaged premises for the protection of mortgagees or in aid of actions for foreclosure or sale is well established. Under the former practice of the English Court of Chancery a distinction was always observed in the appointment of receivers between legal and equitable mortgages (all mortgages subsequent to the first being equitable mortgages), the former vesting the legal estate at once in the mortgagee with a right, as soon as the mortgage-debt is past due and unpaid, to enter into possession or bring an ejectment suit to obtain possession, and the latter conveying no legal title but a mere equity. Under the old law before the Judicature Acts a mortgagee having the legal estate could not, except under special circumstances, obtain from the Court of Chancery the appoint-

ment of a receiver over the mortgaged property because he could take possession under his legal title. But since the Act the Court will appoint a receiver equally at the instance of either a legal or equitable mortgagee. This, it has been said, the Court does, not because the legal mortgagee has, in fact, less power than he formerly had to take possession, but because there is an obvious convenience in granting a receiver so as to prevent a mortgagee from being in the unpleasant position[1] of a mortgagee in possession.[2] By means of the appointment of a receiver mortgagees are able to obtain the benefits of possession without its disadvantages. If a mortgagee voluntarily chooses to take possession he cannot give it up at his own pleasure, although the Court may relieve him in a proper case by the appointment of a receiver.[3]

With reference to the general question of the position of the holders of a mortgage in the English form of land belonging to natives in the mofussil as regards the appointment of receivers by the Court, it is to be observed that under the English practice before the Judicature Act of 1873, the Court of Chancery used to refuse to appoint a receiver on the application of a mortgagee having the legal estate except under special circumstances for two reasons (*a*) that being the owner in the eyes of the common law, he could enter and eject the mortgagor without any process of law using reasonable force if necessary, and could maintain suits for rent as owner as if he were a purchaser or grantee of the property from the mortgagor, (*b*) because if he were evicted by the mortgagor in possession, he could obtain

[1] *See Gaskell* v. *Gosling*, 1 Q. B. (1896), 669, 691.

[2] Kerr, 31, 32; *v.* post, *Jaikissondas* v. *Zenabai*, I. L. R., 14 Bom., 431.

[3] *Re Prytherch*, 42 Ch. D., 590; *County, etc., Bank* v. *Ruding, etc., Colliery*, 1 Ch. (1895), 629.

possession by an action of ejectment which would be practically undefended unless the execution of the deed were denied. On the other hand the Court freely granted a receiver to equitable mortgagees if the interest were in arrear, or the security insufficient, or in danger, almost as a matter of course.

But this view has never obtained in India at any rate since the fusion of law and equity on the establishment of the High Court in 1862 for the following reasons :— The Indian Courts hold, at any rate as regard mortgages other than English mortgages, that here there was no such thing as a bare legal estate carrying with it a right of possession by the common law subject to be restrained by a Court of Equity. They considered that there was only one ownership, that is, the beneficial ownership corresponding to an equitable ownership, and that whatever the form of the transaction was, the substance must be looked to and the mortgagor be regarded as owner and the mortgagee only as owner of an incumbrance or lien on the property. The result was that it came to be regarded as doubtful by the legal profession whether a suit in ejectment would lie at the instance of the holder of a mortgage in the English form, and they have always advised it was unsafe to file one. Further, it was the policy of the Indian law to discourage any attempt to enforce a claim of right to property by force or show of force (*see* Indian Penal Code, section 143). This ejectment by reasonable force without process of law became illegal in India in many cases in which it was legal in England. The nett result was that the High Court treated all mortgagees as equitable mortgagees irrespective of whether the form of the deed would give them a legal estate according to English law and appointed receivers in mortgage cases without taking any heed of

this distinction. By the Judicature Act, 1873, section 25 (8), the old English practice was swept away and power was given to the English High Court to appoint a receiver in all cases in which it might appear to the Court to be just or convenient, and it has been held that a receiver may now be appointed when the plaintiff is legal as well as equitable mortgagee[1] and a receiver has been appointed to relieve a mortgagee from the liabilities incurred by taking possession.[2]

When the mortgagor is the holder of the legal title and entitled to the possession of the mortgaged premises, his possession under the legal estate will not be disturbed except in a case of fraud or danger to the rights of the mortgagee if the estate is not taken under the protection of the Court. In general, it may be said to be the rule in these cases that a receiver will be appointed whenever it appears that the mortgagor is making such use of the premises as to impair the security and when the security is inadequate. This inadequacy may be either, first, the insufficiency of the mortgaged premises as a security for the mortgaged debt; or, second, the irresponsibility or inability of the mortgagor or other person liable for the debt to pay any deficiency. The inadequacy of the security must be limited to the debt of the mortgagee making the application.[3] A mere default in payment of the debt constitutes no ground for the exercise of the jurisdiction unless there is a stipulation to that effect in the mortgage.[4] Mortgage-deeds in the English form, however, generally contain an appointment of, or a power for the mortgagee to appoint, a person to be the receiver of the mortgaged premises in order to secure the

[1] *Pearce* v. *Fletcher*, 1 Ch. D., 206.
[2] *Mason* v. *Wessary*, 32 Ch. D., 273.
[3] Beach, § 519; High, § 639.
[4] Beach, *ib.*

due payment of the interest; and under clause 2, section 6 of the Indian Act XVIII of 1866 (which applies only to English mortgages) a power to appoint a receiver can also be claimed by the mortgagee if it is not expressly negatived by the terms of the instrument.[1] But a private receiver deriving his power from the appointment of a mortgagee is almost unknown to Indian Courts or the Indian people, and in most cases at any rate in this country the appointment of a private receiver will not be so advantageous as that of a receiver appointed by the Court with the power of the Court behind him and the orders of the Court in his hands. A receiver may be appointed on the application of an equitable mortgagee in a foreclosure suit or other suit for enforcing his security against the mortgagor in possession having the legal estate.[2]

In this country also the Courts have exercised the jurisdiction in aid of actions for foreclosure or sale brought by mortgagees.

In a suit by a mortgagee for foreclosure or sale in default of payment of his mortgage-debt the Court of first instance when passing a decree for the plaintiff refused, on the plaintiff's application, to appoint a receiver of the rents and profits of the mortgaged property. The plaintiff appealed against the latter part of the decree, and, after filing a memorandum of appeal, obtained a rule for the appointment of a receiver until the hearing of the appeal. The Court of Appeal after argument made the rule absolute, and appointed a receiver until the hearing of the appeal, and subsequently, when the appeal came on for hearing, varied the decree of the Court below by appointing a receiver of the mortgaged property. Upon

[1] *See* Rash Behary Ghose on Mortgages, 3rd Ed., 603 *et seq.*; Kerr, 40-42.

[2] Kerr, 39.

the hearing of the rule it was objected that the plaintiff as the legal mortgagee of the property could himself obtain possession and was not entitled to a receiver, but the Court (Sargent, C. J.) said :

Jaikissondas Gangadas v. *Zena Bai.*

"We think this rule must be made absolute. The question is, whether a receiver can be appointed upon an interlocutory application in a suit for foreclosure or sale of mortgaged property. No doubt under the old practice of the Court of Chancery it was not usual to do so, except under very special circumstances. But in England it appears that the practice has been altered since the passing of the Judicature Acts. In the *Anglo-Italian Bank* v. *Davies*[1] Jessel, M. R., says (page 286) : 'Now, what has the Judicature Act done? In the first place I think that the Act of 1873, section 25, sub-section 8, has enlarged very much the powers which Courts of Equity formerly possessed of granting injunctions or receivers. The words are 'A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just.' Then it goes on : 'If an injunction is asked either before, or at, or after, the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass,' it may be granted whether or not certain things have occurred which, prior to the passing of the Act, would in one alternative have prevented the Court from granting an injunction or receiver.'

"Cotton, L. J., says (p. 293) : 'There is nothing whatever to prevent the Court from interposing on in-

[1] L. R., 9 Ch. D. at p. 286.

terlocutory motion. If there were any formal difficulty, in my opinion the Judicature Act, 1873, section 25, sub-section 8, removes it. Under that sub-section the Court may and does grant receivers when it never could have done so before. Thus, for instance, it has power to grant a receiver under that section where a plaintiff has himself the power of obtaining possession at law.'

"We are of opinion that this Court possesses the same powers with regard to the appointment of a receiver as are possessed and exercised by the Courts in England under the Judicature Act, and we can see no reason why the practice in respect of these matters should not be the same. In the case of In re *Pope*,[1] Cotton, L. J., says: 'The practice of the Court as regards granting receivers was greatly altered by the 8th sub-division of the 25th section of the Act of 1873: * * * * * Since the passing of that Act it has been a usual practice for the Chancery Division to grant a receiver at the instance of a legal mortgagee just as it formerly did at the instance of an equitable mortgagee. Because although a legal mortgagee has power to take possession, and can do so without the assistance of a Court of Equity, yet there are obvious conveniences in granting a receiver, so as to prevent a mortgagee from being in the very unpleasant position of a mortgagee in possession; and that has been constantly done. What the Court of Chancery did up to the time of the Judicature Act was that, when there was difficulty in the way of a judgment-creditor getting possession by process of law, and after he had tried to get possession by legal process, if he failed, then the Court interposed by granting a receiver, which was then considered and was in fact the proper course to adopt. But in my opinion, as

[1] L. R., 17 Q. B. D. at pp. 749 and 750.

this section enables the Court of Equity to depart from its former practice and to grant a receiver, not only where there is no power to take possession at law, but where there is power to interfere, if it is just or convenient that an order for a receiver shall be made, then, in my opinion, if it was just or convenient, the Court in this case had power to grant a receiver, though undoubtedly the judgment-creditor could by *elegit* have got possession.'

"Now in the present case we think it 'is just and convenient' that a receiver should be appointed. There are exceptional circumstances here. The mortgage-debt is for a very large amount. The value of the property is said to be insufficient to cover the debt, and there is a large sum owing for arrears of interest. It is, therefore, a case in which a receiver is desirable, and we think he ought to have been appointed by the decree made by the Court below." The rule was accordingly made absolute with costs.[1]

When the security contains a power to the mortgagee to appoint a receiver the power can only be exercised in terms of the security, and if it is not exercised *bonâ fide*, the Court will interfere and appoint its own receiver.[2] It has been held that although a mortgagee may, under the Conveyancing Act, appoint a receiver without coming to the Court, it may be more desirable, where an action for foreclosure is pending, that the appointment should be made by the Court.[3]

Nextly, as to receivers between first and junior mortgagees. According to the strict common law theory of a mortgage the mortgagee takes an estate subject to defeat

[1] *Jaikissondas Gangadas* v. *Zena Bai and Kazi Mahomed Miya Dada Miya*, I. L. R., 14 Bom., 431 (1890). *See* also *Appasami Naickan* v. *Jotha Naickan*, I. L. R., 22 Mad., 448 (1899).

[2] Kerr, 40, 41.

[3] *Tillet* v. *Nixon*, 25 Ch. D., 238.

upon the payment of the principal and interest when due; in default of payment the estate becomes absolute, and the mortgagee is entitled to possession either by entry or ejectment. In equity the harshness of this rule was tempered by conferring upon the mortgagor for a fixed time after default the right of redemption. Accordingly, if the mortgagor had executed a second or other subsequent incumbrance, such later incumbrances were treated as equitable mortgages—a sort of lien cognisable only in a Court of Equity. This gave to the mortgagees under second mortgages the right to call upon the Chancellor for aid, whenever their security was endangered by acts or defaults, either of the elder mortgagees or the mortgagor. The rule was therefore well established that until the first mortgagee took possession, equity could interfere in aid of subsequent incumbrancers and appoint a receiver.[1]

At first it was held that this could not be done without the consent of the first mortgagee because the Court could not prevent him from bringing ejectment against the receiver as soon as he was appointed. But this was subsequently modified inasmuch as there was no reason, if the first mortgagee had not taken possession, why the Court should not appoint a receiver of the estate, the appointment being made without prejudice to his rights. If the mortgagee was not before the Court in the proceeding for the appointment of the receiver, he might apply for leave to bring ejectment, which was granted as of course. If the mortgagee would not take possession, a receiver was appointed without his consent. If care be taken that he is not prejudiced, he has nothing to do with the motion for a receiver. The Court will not allow him to object to the appointment by anything short of a personal assertion

[1] Beach, § 547; Kerr, 37; *Dalmer v. Dashwood*, 2 Cox, 383, and other cases there cited; High, § 679.

of his legal rights on taking possession himself. The only way in which the mortgagee can prevent the appointment is by taking possession.[1]

Where, however, the first mortgagee is in possession, the common law rule defining the rights of junior and senior mortgagees was stated by Lord Eldon to be as follows:—"If a man has a legal mortgage, he cannot have a receiver appointed; he has nothing to do but to take possession. If he has only an equitable mortgage, that is, if there is a prior mortgagee, then if the prior mortgagee is not in possession, the other may have a receiver without prejudice to his taking possession; but if he is in possession you cannot come here for a receiver; you must redeem him and then in taking the accounts, he will not be allowed any sums that he may have paid over to the mortgagor after notice of the subsequent incumbrance.[2]" The Court will, therefore, not appoint a receiver at the instance of a second mortgagee or equitable encumbrancer against a prior legal mortgagee in possession as long as anything remains due to him on the mortgage security. He is entitled to retain that possession until he is fully paid. So long as anything is due, in one case it was said if even a sixpence is due, the receiver will be refused. But it should clearly appear that something is due, and if the accounts of the mortgagee are so incomplete that he cannot determine definitely whether or not anything is due, the Court may assume that nothing is due. In other cases a receiver will not, in general, be appointed except upon an admission that he has been paid off or on his refusal to accept what is due to him. The rule applies equally whether the priority is original or has been acquired subsequently by an assign-

[1] Beach, § 548; Kerr, 37.

[2] *Berney* v. *Sewell*, 1 J. & W., 647.

ment of the mortgage, and it only applies as long as anything is due with reference to which the mortgagee has a right to retain possession. Although a receiver will not, as a general rule, be appointed, the Court may, if a case of gross mismanagement of the estate, be made to appear, deprive a prior legal mortgagee of possession; but to warrant such an interference the mismanagement must be of a clear and specified nature.[1]

Other cases.

The cases specifically dealt with in this Chapter are those of most frequent occurrence. Receivers have, however, been appointed in other cases as in that of companies ;[2] corporations ;[3] interpleader suits ;[4] arbitrations;[5] litigation in a foreign Court;[6] in aid of annuitants,[7] and in other cases. In this connection it is to be observed that the jurisdiction is not limited by precedent, but is to be ascertained by reference to the provisions of the Code which state that *whenever* it appears to the Court to be necessary for the realization, preservation or better custody or management of *any* property moveable or immoveable the *subject of a suit*, the Court may by order appoint a receiver of such property.[8]

§ 23. An appeal lies from an order passed under section 503 appointing, or refusing to appoint,[9] a receiver.[10] A Subordinate Judge when considering the expediency of the appointment of a receiver is acting under section 503 as explained by section 505. When he does appoint his

[1] Kerr, 32, 36; Beach, § 550.
[2] Kerr, 57-70.
[3] Gluck and Becker's Receivers of Corporations.
[4] *Howell* v. *Dawson*, 13 Q. B. D., 67.
[5] Kerr, 104.
[6] *Ib.*
[7] Beach, § 487.
[8] Civ. Pr. Code, s. 503.
[9] *Venkatasami* v. *Stridavamma*, I. L. R., 10 Mad., 179 (1886), F. B. overruling *Subramanya* v. *Appasami*, I. L. R., 6 Mad., 355 (1883); *Gossain Dulmir Puri* v. *Tekait Hetnarain*, 6 C. L. R., 467 (1880); *Baidya Nath Adya* v. *Makhan Lal Adya*, I. L. R., 17 Cal., 680 (1891).
[10] Civil Procedure Code, s. 588, cl. 24.

order is passed under section 503, and when he refuses to take the necessary step preliminary to appointment, his order is also made under that section, and an appeal lies from such an order made by a Subordinate Judge.[1] An order made by a Subordinate Judge dismissing an application for the appointment of a receiver after obtaining sanction from the District Judge is an order under section 503 and not under section 505 and therefore appealable.[2]

No appeal lies from an order passed under section 505 by a Court subordinate to a District Court, submitting the name of a person sought to be appointed a receiver, together with the grounds for the nomination, such being only a preliminary order or expression of opinion and not an order under section 503. Nor does an appeal lie from the order of the District Court confirming such nomination.[3] While an appeal lies from an order rejecting an application for a receiver under section 503, the order on appeal is final, and there is no second appeal.[4] By a decree in an administration suit, *A* was appointed receiver "to manage the estate;" *A* died, and by a subsequent order *B* was appointed receiver. One of the defendants in the suit applied to have *B* removed from the office of receiver on the ground of his alleged mismanagement of the estate. The application was refused. *Held*, that the order of refusal was appealable whether the former or present Code of Procedure was deemed to be applicable, being an order made in respect of a question arising between the parties to a suit relating to the execution of the decree.[5]

[1] *Sangappa* v. *Shivbasawa*, I. L. R., 24 Bom., 38 (1899).

[2] *Gossain Dulmir Puri Tekait Hetnarain*, 6 C. L. R., 467 (1880).

[3] *Birojan Kooer* v. *Ram Churn Lall Mahata*, I. L. R., 7 Cal., 719 (1881); approved in *Chunilal Hajarimal* v. *Sonibai*, I. L. R., 21 Bom., 328 (1895).

[4] *Baidya Nath Adya* v. *Makhan Lal Adya*, I. L. R., 17 Cal., 680 (1890).

[5] *Mithibai* v. *Limji*, I. L. R., 5 Bom., 45 (1880).

There is no appeal to His Majesty in Council against an order refusing the appointment of a receiver in a suit. Such order does not finally decide any matter which is directly at issue in the cause in respect to the rights of the parties, and is not "final" within the meaning of clauses (*a*) and (*b*) of section 595 of the Civil Procedure Code and section 39 of the Letters Patent; nor is the matter a special case falling within the terms of clause (*c*) of section 59 of the Code or section 40 of the Letters Patent.[1]

[1] *Chundi Dutt Jha* v. *Pudmanand Singh Bahadur*, I. L. R., 22 Cal., 92 (1895).

CHAPTER IV.

RECEIVERS OF PROPERTY UNDER ATTACHMENT.

§ 24. Receivers of attached property.
§ 25. When and how appointed.
§ 26. Power and duties of receiver.
§ 27. Removal of receiver.

Receivers of attached property.

§ 24. WITH regard to managers or receivers of attached property section 243 of the Civil Procedure Code of 1859 (Act VIII of 1859) contained the following provisions:—

"When the property attached shall consist of debts due to the party who may be answerable for the amount of the decree, or of any lands, houses, or other immoveable property, it shall be competent to the Court to appoint a manager of the said property, with power to sue for the debts, and to collect the rents or other receipts and profits of the land or other immoveable property, and to execute such deeds or instruments in writing as may be necessary for the purpose, and to pay and apply such rents, profits, or receipts towards the payment of the amount of the decree and costs; or, when the property attached shall consist of land, if the judgment-debtor can satisfy the Court that there is reasonable ground to believe that the amount of the judgment may be raised by the mortgage of the land, or by letting it on lease, or by disposing by private sale of a portion of the land, or of any other property belonging to the judgment-debtor, it shall be competent to the Court, on the application of

the judgment-debtor, to postpone the sale for such period as it may think proper to enable the judgment-debtor to raise the amount. In any case in which a manager shall be appointed under this section, such manager shall be bound to render due and proper account of his receipts and disbursements from time to time as the Court may direct."

Chapter XXXII of the Code of 1877 (Act X of 1877) supplied the place both of the last mentioned section as also of the 92nd section of the Code of 1859 dealing with receivers of property in dispute in a suit and going further gave the Court very general powers as to the appointment of receivers. The provisions in the Code of 1877 were identical with those of the present Code save that in the present Code the words "as the Court thinks fit" in section 503, cl. (*d*), have been inserted after the word "remuneration," and the consent of the Collector is required to his appointment under section 504.

Section 503 of the present Code runs as follows :—

"Whenever it appears to the Court to be necessary for the realization, preservation, or better custody or management of any property, moveable or immoveable, the subject of a suit, *or under attachment*, the Court may by order

(*a*) appoint a receiver of such property, and, if need be,

(*b*) remove the person in whose possession or custody the property may be from the possession or custody thereof;

(*c*) commit the same to the custody or management of such receiver ; and

(*d*) grant to such receiver such fee or commission on the rents and profits of the property by way of remuneration, and all such powers

as to bringing and defending suits, and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of instruments in writing, as the owner himself has, or such of those powers as the Court thinks fit.

Every receiver so appointed shall (*e*) give such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property,

(*f*) pass his accounts at such periods and in such form as the Court directs ;

(*g*) pay the balance due from him thereon as the Court directs ; and

(*h*) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

Nothing in this section authorizes the Court to remove from the possession or custody of property under attachment any person whom the parties to the suit, or some or one of them, have or has not a present right so to remove."

When and how appointed.

§ 25. The appointment of a receiver by the Court at the instance of a judgment-creditor is a process of execution known in England as equitable execution being a process of execution enforced by the Court at the instance of a judgment-creditor.[1] Inasmuch as however the term arises out of the dual jurisdiction of the Courts of Common Law and Chancery, it has no real applicability

[1] *Fink* v. *Maharaj Bahadur Sing*, I. L. R., 26 Cal., 772 (1899) ; S. C., 4 C. W. N., 27. See *ante*, Ch. III, "Debtor and Creditor."

to the similar remedy in this country. In England when a person had obtained a judgment, the natural course was to take the ordinary legal process by writ of *elegit ;* but there might be difficulties which prevented him from getting the land delivered in execution under the *elegit*. Where, therefore, there was a judgment, which owing to legal impediments could not be enforced at law, he came into equity for what was called equitable execution ; that is to say to have the lands delivered to him in execution to him in equity when he would have got them at law in the ordinary process, but for certain difficulties existing. He accordingly filed a bill in equity asking for payment of the judgment-debt by means of a receiver.[1] It is obvious, therefore, that the proceeding under section 503 of the Code has, beyond the fact that a receiver is appointed, nothing in common with what was technically styled "equitable execution." Under the Code the appointment of a receiver is but one of the various proceedings relating to execution which are governed by one and the same law administered by Courts which are both Courts of Equity and Common law. Such appointment is resorted to not because of any legal hindrance to execution, but because it is the best means available under the particular circumstances of the case to give effect to and secure the rights of the judgment-creditor and judgment-debtor respectively.

A judgment does not vest in a judgment-creditor any portion of the property of his judgment-debtor. It gives him the right to have the judgment executed, but until execution the property of the judgment-debtor does not vest in the judgment-creditor simply by virtue of the judgment. In the undermentioned case the appellant,

[1] *Anglo-Italian Bank* v. *Davies*, L. R., 9 Ch. D., 283, 290 (1878).

having obtained a decree for money, sued to recover the unsatisfied balance thereof from the respondents alleging that the property of the deceased judgment-debtor (being one-seventh share in the legacy of his father) was in their possession. He prayed that after due enquiry, adjustment of accounts and the determination of the value of the said legacy out of the share which might be found due to the judgment-debtor, the abovementioned balance might be decreed with interests and costs. *Held*, that the decree did not vest in the appellant a right to the property sued for, and consequently that he could not maintain this suit. The proper mode of enforcing a decree is that pointed out by the Code of Civil Procedure, namely, by execution and sale, or by execution and attachment, and the appointment of a receiver to collect the property. Where the Legislature has prescribed a particular mode of enforcing a right created by a decree, the possessor of that right is bound to follow the procedure prescribed and no other.[1] The Court cannot make an order to continue an attachment so as to provide for money not actually due, the right to attachment being only for sums actually due.[2]

When a manager is appointed, the appointment is made after hearing the arguments on both sides, and the appointment is generally considered one which, although made primarily in the interest of the debtor, is likewise in the interest of all parties concerned.[3] In some cases it may be as much to the interest of the judgment-creditor as to that of the debtor as in cases where there are incumbrances affecting the property, or

[1] *Mirza Mahomed Aga Ali Khan Bahadoor* v. *The Widow of Balmakund*, L. R., 3 I. A., 241 (1876).
[2] *Ramdhan Mitter* v. *Koilasnath Dutt*, 4 B. L. R., A.C., 20 (1869).
[3] *Huree Sunkur Mookerjee* v. *Jogendro Coomar Mookerjee*, 19 W. R., 66 (1873).

numerous creditors or an immediate sale is not possible, or, if possible, cannot be effected except at a sacrifice of the property, unless, as often happens, it is the object of the creditor to obtain possession of the property of his debtor below its real value. The application may be made either by the judgment-creditor or debtor. It is entirely discretionary with a Court to appoint a receiver and to allow a debt to be paid by degrees.[1] In considering whether execution should proceed in the ordinary course or whether a receiver should be appointed to discharge the debt from the profits of the property, the Court will use its discretion having regard to all the circumstances of the case. It will see whether the amount due under the decree is likely to be realized within a reasonable time from the profits of the attached property, hearing the objections of the decree-holder where he does not assent to this course. The fact of a manager having been appointed to realize the profits of a property with a view to satisfy certain decrees, even though the appointment should have been confirmed by the High Court, is no bar to a Judge on the application of another decree-holder enquiring into the state of the property and passing proper orders and, should he find that the proceeds are insufficient to satisfy all the decrees within a reasonable time, causing the decree to be executed in the usual way.[2] And when a judge on the death of a manager reviewed the progress made and finding that under such management the decree was not likely to be satisfied for a very long time, directed execution to proceed against the estate, it was held that his discretion had been properly

[1] *Din Dyal Lall* v. *Ram Ruttun Neogee*, 16 W. R., 46 (1871); v. *post*.

[2] *Brojender Narain Roy* v. *Kanwar Roy*, 1 W. R., Misc., 15 (1864).

exercised.[1] Where reference was made to a circular order in which the Court stated that two or three years should ordinarily be the limit for which a property should be put under the charge of a manager, the Court stated as follows :—"The Court does not, I apprehend, intend by these words to limit the time strictly to that period in all cases, but requires thereby that in each case the judge who directs the appointment of a manager should exercise a proper discretion with reference to all the circumstances of the case in calculating the time in which the debts may be paid off. If, after a year or two it appears that the collections are insufficient to meet the claims of the creditors, there is no reason why an application should not be made to the Court for the removal of the manager and the sale of the property."[2]

In the undermentioned suit numerous decrees had been obtained against the defendants, part of whose property consisted of a village which was attached in 1859. The village was under the management of the Collector whom the Courts below treated as a manager put in under section 243 of the Code of 1859. The decree-holders received rateable shares in the nett income of the village in liquidation of their respective decrees. It appeared that it would take fifteen years to pay off the various decree-holders. The petitioner applied to the Civil Court for an attachment of the village in execution of his decree. The application was refused on the ground that the village was already under attachment in satisfaction of other decrees. Upon appeal the High Court ordered a sale of the village, the sale-proceeds to be dealt with in accordance

[1] *Doorga Dutt Singh* v. *Bunwaree Lall Sahoo*, 25 W. R., 33 (1876).

[2] *Bunwaree Lall Sahoo* v. *Girdharee Singh*, 16 W. R., 273, 274. *See* also observations in *Huree Sunkur Mookerjee* v. *Jogendro Coomar Mookerjee*, 22 W. R., 220 (1874).

with the proper provisions of the Code, on the ground that it could never have been intended to give the Civil Courts for an indefinite length of time, the management of the encumbered estates of the country or to compel decree-holders to submit to such an unreasonable delay as fifteen or twenty years before obtaining satisfaction of their decree.[1] Where a Subordinate Judge was of opinion that an application for the appointment of a manager was made only to put off payment of the debt, the High Court held he was not wrong in exercising his discretion, and refusing to appoint a manager.[2] A Court executing a decree was held to have been justified in refusing to appoint a manager for attached property belonging to the judgment-debtor, where it would have taken 20 years to pay off the debt from the profits of the property. But the High Court saw no objection to the appointment of a manager to dispose of portions of the property by sale mortgage and otherwise if the debt could thereby be cleared off in six months.[3] A Court cannot refuse to order attachment on application of a decree-holder: nor can it appoint a manager until after attachment, the Code assuming that the property has already been attached. After, however, an attachment has been made according to law, the Court may proceed either to order the sale of the property or to appoint a manager or receiver for the purpose of liquidating the debt, should that be considered to be the best course

[1] *Rednum Atchutara Mayya* v. *Khaja Mahomed Amin Khan*, 5 Mad. H. C. R., 272 (1870). In this case the attachment and management of the estate had already been under the care of the Courts for more than ten years. In *Mohunt Ram Rucha Doss* v. *Doorga Dutt Misser*, 13 W. R., 453 (1870), the Lower Court considered six years a reasonable period. As to however, the powers of management under the present Code, v. *post*.

[2] *Ootum Singh* v. *Ram Surun Lall*, 23 W. R., 287 (1875).

[3] *Mohinee Mohun Dass* v. *Ram Kant Chowdhry*, 15 W. R., 322 (1871).

both for the creditor and for the debtor.[1] Attachments are not superseded by the appointment of a manager. The object of the appointment is for the protection of the estate consistently with the security of creditors, and it would place the creditors in an exceedingly unsafe position if the appointment of a manager had the effect of entirely destroying that security.[2] The proceeding does not change the property in the subject which is attached and affected by it. The manager appointed, so far as he is an officer of the Court, is at most the hand of the Court for the purpose of carrying out the provisions of the Code.[3]

There is nothing in the Code to prevent property which has been once attached from being afterwards attached by a judgment-creditor in another suit if only this can be done before it has been sold by order of Court and so the judgment-debtor divested of all rights to it. The fact that property under attachment is in the hands of a manager or receiver does not protect it from attachment of all other creditors.[4] A manager may be appointed by the Court without the consent of the decree-holder. He is, however, appointed for the purpose of recovering sums due under judicial awards, and claims which are not based on such awards cannot be allowed to be realized by a manager to the prejudice of the decree-holders for whose benefit alone the manager is appointed and who in law are entitled to be first paid. The Court has no power to order that the manager should, out of the proceeds of the estate, satisfy the claims of persons other than decree-holders.[5]

[1] *Bunwaree Lall Sahoo* v. *Girdharee Singh*, 16 W. R., 273 (1821).

[2] *Mohabeer Pershad Singh* v. *Collector of Tirhoot*, 13 W. R., 423 (1870); *Bunwari Lall Sahu* v. *Mohabir Persad*, 12 B. L. R., 297 (1873); L. R., 1 I. A., 89, 95.

[3] *John Tiel & Co.* v. *Abdool Hye*, 19 W. R., 37, 38 (1873).

[4] *John Tiel* v. *Abdool Hye*, 19 W. R., 37 (1872).

[5] *Thakoor Chunder* v. *Chowdhry Chotee Singh*, Marshall, 261 (1863).

Where a judgment-debtor asks that a manager be appointed, he must show that the circumstances are such that the order for which he applies would be a reasonable and proper one. He should not only show what is the income of the particular property and the amount due under the decree but he should also show whether that income is unincumbered, and if incumbered, to what extent. He cannot ask the Court to make an order under this section with respect to one single property before disclosing the whole state of his affairs, the extent of his liabilities and the means he has of meeting them.[1] The fact of the judgment-debtors possessing properties other than the one attached is no ground for rejecting an application for the appointment of a manager. To save a particular property from sale a judgment-debtor must show the value and condition of other properties in his or her possession, and the judge must consider how and by what arrangement such a disposal of different portions of such property may be made so as to avoid the sale of the property already attached.[2] Where a decree for a bond debt contained a clause to the effect that if the money due was not paid the property pledged in the bond might be sold, the clause was construed to mean that the property was liable for the debt decreed. *Held*, also, that the decree-holder could get at the property only in execution of the decree, in which case he would be in the position of any other judgment-creditor and be bound by the provisions of the Civil Procedure Code and the judgment-debtor would be entitled to the benefit of section 243 relating to the appointment of a manager of attached property.[3] Under

[1] *Dinobundhoo Singh* v. *Macnaghten*, 2 C. L. R., 185 (1878).

[2] *Debkumari Bibi* v. *Ram Lal Mookerjee*, 3 B. L. R., App., 107 (1869).

[3] *Mohunt Ram Rucha Doss* v. *Doorga Dutt Misser*, 13 W. R., 453 (1870).

the Code of 1859 the Court might postpone the sale of property on being satisfied that there was reasonable ground to believe that the amount of the judgment might be raised in the manner there stated. This provision was held, however, not to authorise the postponement of the sale of attached property for one year, security being given for the payment of the debt within that time.[1] Under the same Code it was held that where a Deputy Collector executes a decree against a party holding another decree from his own Court, he ought, instead of selling that other decree, to appoint a manager to realize the judgment-debt due thereon.[2]

In the case undermentioned an application was made in Chambers for the appointment of a receiver for the purpose of realising certain monies in execution of a decree. The plaintiff had obtained a decree against the defendant and in execution of that decree obtained an order under section 268, Civil Procedure Code, prohibiting and restraining the defendant until the further order of the Court from receiving from the Chief Auditor, East Indian Railway Company, a moiety of his salary with exchange compensation allowance for each and every month, commencing from the date of the order, and the Chief Auditor from making payment of those sums to any person whomsoever. On the 24th August 1900, the plaintiff obtained an order that the Chief Auditor should be at liberty to pay into Court the moneys attached under the previous order, but the Chief Auditor in the exercise of his discretion under the last paragraph of section 268, declined to pay the money into Court. Upon the attorney for the plaintiff applying for the appointment of a receiver under section 503, Civil Procedure Code, contending

[1] *Fyz-ood-deen* v. *Giraudh Singh*, 2 N.-W. P., 1 (1870).

[2] *Ram Chunder Ray* v. *Ram Churn Bukshee*, 9 W. R., 372 (1868).

that that was the only course left open to him to realise the money, and it was the usual course followed in such cases, the Court observed that the appointment of a receiver would be a heavy burden on the defendant, and asked whether there was any precedent. It was thereupon pointed out that in the case of *Girdharilal Dhunmia* v. *Jogeshur Roy and others* (unreported) a receiver was appointed by Sale, J., under similar circumstances, upon which the Court granted the application.[1]

Assets realized by the appointment of a receiver after decree are assets realized by a process of execution provided for by the Code. Rents of property under attachment realized by a receiver appointed at the instance of a decree-holder are assets realized by "sale or otherwise in execution of a decree" within the meaning of section 295 of the Code. That section provides for a rateable distribution of the assets amongst the decree-holders. But no creditor who obtains an attachment order subsequent to the realization by the receiver is entitled to participate, as it is only decree-holders who have applied to the Court for execution of their decrees prior to the realization who are comprehended in that section.[2]

Powers and duties of the Receiver.

§ 26. The position of the manager under section 243 of the Code of 1859 was stated in a judgment from which the following passage is taken :

"It is to be observed, as we understand this section, that this proceeding does not change the property in the subject which is attached and affected by it. It seems to us that the manager so appointed by the Court, so far as he is an officer of the Court, is at most the hand of the Court for the purpose of gathering in, on behalf of the

[1] *Umbica Churn Sarnakar* v. *A. C. Meik*, 5 C. W. N., XXII.

[2] *Fink* v. *Maharaj Bahadoor Sing*, I. L. R., 26 Cal., 772 (1899); S.C., 4 C. W. N., 27.

judgment-debtor, the moneys due to him, in order that they may be immediately applied to the satisfaction of the decree, *i.e.*, to the discharge of the judgment-debt. If the manager so appointed affects to do more than this and deals with the subject of property itself—if for instance he carries on such a concern as this Seetulpore indigo concern and works it as a proprietor would work it,—he must do so, in our opinion, as the agent of the judgment-debtor, and not properly as an officer of the Court. We need hardly here remark that, on the Original Side of this Court, a question has been lately considered and discussed at some length as to what are the proper functions, and what is the true *status*, of a receiver appointed by the Court in a civil suit, with the object of preserving property and of keeping it within reach of the Court until a final decree can be made between the parties. We may, however, say, we consider it to be quite settled that the receiver, even in that case, can but exercise at the utmost such powers and rights over the property as the parties to the suit turn out to be possessed of when those rights are finally determined. He does not, as seems sometimes to be imagined, in some mysterious way, represent the Court itself, and by virtue of its authority, override the parties and all the world besides. We do not know whether it has ever been held that the District Courts of this country have the authority to appoint a receiver of such a character as that which we have just mentioned ; probably they would be held to have it, if it should become necessary in order completely to administer justice within their jurisdiction to make such an appointment. But we do not at this moment remember any case in which such an appointment has been made, and we believe that at any rate such cases, if they have occurred, are exceedingly rare. But however

this may be, the manager who has been appointed by the Judge's Court in the present matter now before us, does not trace his authority to any general powers of the Court. He is certainly nothing other than such an officer as the Court is expressly authorized to appoint by section 243, and it appears to us that the purpose of that section, so far as concerns the appointment of a manager, is limited to the *collection* of moneys and money profits which may be due to the judgment-debtor. As we have already said we are very strongly of opinion that it never was the intention of the Legislature, when it used the words of the first part of that section, to give a Court power to take the property of judgment-debtors into its own hands, and *to manage* it as of its own authority during a course of years for the benefit of certain favoured judgment-creditors to the exclusion of all others. We think that if the Legislature had entertained the intention to confer such an extraordinary power, it would have expressed it clearly, and would have taken care to hedge the gift about with qualifications which are, as it seems to us, absolutely necessary to prevent the exercise of it from leading to very great mischief indeed."[1]

In *Moran* v. *Muttu Bibee*[2] in which case a manager of an indigo concern mortgaged the property, Phear, J., after citing section 243 of the old Code, said :—

"It seems to me that the Legislature did not intend by thus using the word 'manager' to imply by the force of that word alone that the person appointed should have power to manage and carry on the property, whatever its nature, in respect of which he is appointed : I think that the word is a mere designation of a person, whose power is specified in the following sentence, namely, with power

[1] In the matter of *Messrs. John Tisl & Co.* v. *Abdool Hye, &c.*, 19 W. R., pp. 37, 38 (1872); *per* Phear, J.

[2] I. L. R., 2 Cal., 72 (1876).

to sue for the debts, and to collect the rents and other receipts and profits of the land or other immoveable property, and to execute such deeds or instruments in writing as may be necessary for the purpose, and to pay and apply such rents, profits, or receipts towards payment of the amount of the decree and costs. The same word 'manager' is thus used in reference to cases where obviously there could be nothing to manage, and where the person appointed could be nothing more than a receiver, as to others; and in the powers expressly attributed to him there is nothing which could enable him to carry on any business, or to raise money for that or any other purpose. He appears to be even narrowly restricted in regard to the application of the rents and profits which he may collect, *i.e.*, to paying them towards the amount of the decree and costs. It is also not unimportant to remark that in the immediately following passage of the same section the Legislature employs express words to authorize the Court to raise money, by means short of selling the land, for the purpose of discharging the judgment-debt; if it had intended to give the manager or even the Court a like power for the purpose of merely managing the property or carrying on a business concern, with a view to discharging the judgment-debt out of the profits, it surely would have conferred the power expressly among the other powers mentioned and would not have let it simply lurk under cover of the name 'manager.' The last words of the section: 'In any case in which a manager shall be appointed under this section, such manager shall be bound to render due and proper accounts of his receipts and disbursements from time to time as the Court may direct' do not enlarge the passage which I have quoted, because a mere receiver must, or may, have to disburse money in the course of collecting rents and profits and

suing for debts, &c. On the whole, I feel bound to say that we cannot find in section 243 any legislative authority given to the Court to appoint a manager to carry on a judgment-debtor's business pending execution proceedings, and to invest him with power to raise money for that purpose, although I am aware that a practice of this kind has, on some ground or another, become very prevalent. And I need hardly add that if a manager appointed under section 243 has not in himself any statutable authority to carry on and manage a business or other property, he certainly has no authority to hypothecate, produce, &c., for expenditure to that end. I do not know whether it has been decided to what extent the Civil Courts of the Mofussil have the power such as that possessed by the Court of Chancery at home, and by this Court, of managing the property of parties to a cause, pending suit or administration; or if so, whether their power in this respect arises in proceedings had solely for the purpose of enforcing execution of a decree. But however this may be, the Court's manager, under such circumstances, only acquires a right to charge his costs and expenditure against the parties to the suit, or persons who have knowingly placed themselves in a like position relative to his management, and even then he can only do so in respect of such expenditure as has been expressly sanctioned by the Court. The ground of his right is that he is the Court's officer acting under the Court's discretion as between the parties to the suit and with the Court's sanction which cannot, of course, be rightly given without specific inquiry in each matter requiring sanction; the exercise of the Court's discretion cannot be delegated to the manager by anticipation."[1]

[1] *Moran* v. *Mittu Bibee*, I. L. R., 2 Cal., pp. 72 to 74 (1896).

As will, however, be observed from the terms of the section the scope of the powers and duties of receivers of attached property are wider under the present than under the Code of 1859 under which the decision last cited was given. The Court may commit the property to the custody or management of the receiver who may be given not only all such powers as to *collection* of rents and profits, execution of instruments and bringing and defending suits, but also all such powers for *realization, management, protection and preservation and improvement* of the property as the owner himself has or such of those powers as the Court thinks fit.[1]

The provisions of section 503 were intended to declare that the receiver in respect of all property which was or could be attached had the powers of the owner as they existed at the time the property was brought under the orders of the Court, provided they have not ceased by operation of law.[2] "Powers of the owner" referred to in section 503 must be read in connection with the other provisions of the Code such as those prohibiting alienation after attachment to the prejudice of a decree-holder. In the last mentioned case a zemindar in 1879 granted a lease of part of the zemindary for twenty years reserving a rent of Rs. 18,000 per annum. In 1881, the zemindary having been attached by a creditor, the zemindar granted a new lease in perpetuity in lieu of the former lease, reserving a rent of Rs. 12,000 a year. A receiver of the zemindary, having subsequently been appointed with full powers under the provisions of section 503 of the Code, sued the lessee to recover rent at the rate reserved in the first lease from 1881. The lessee did not deny liability to pay the reduced rent, but asserted that rent could not be recovered under

[1] Civ. Pr. Code, s. 503.

[2] *Gopalasami* v. *Sankara*, I. L. R., 8 Mad., 418 (1885).

the first lease inasmuch as the receiver had the powers of the owner, and as the owner would be bound by the second lease the receiver was bound by it. Upon the principle, however, above stated it was held that the receiver was entitled to recover the rent claimed.[1]

In execution of a decree, an order was made by the Court, directing the payment of the rents of certain property, which had been attached, as they became due from the *mukuraridar* to the judgment-debtors, to be made to the decree-holder to satisfy his decree ; and afterwards the execution case was struck off the file. Subsequently, default having been made by the *mukuraridar* in the payment of the rents of certain years and the decree not having been fully satisfied, the decree-holder applied for an order directing the payment of the rents which were in arrear to be made by the *mukuraridar* in accordance with the previous order. Notice having been directed to be served on the judgment-debtors, they came in and pleaded limitation. *Held*, that as the application was not strictly one for fresh execution, limitation could not apply, and that as the effect of the order in the execution proceedings was virtually to appoint the decree-holder receiver, and as the attachment was still in force, his proper course was to file a regular suit *qua* receiver against the *mukuraridar*.[2]

When a debt due from a third person to the judgment-debtor is attached in the hands of the person who owes it, the Court may, if necessary, appoint a manager to sue for it.[3] A receiver appointed in execution may sue for

[1] *Ib.*

[2] *Radha Kissore Bose* v. *Aftab Chundra Mahatab*, I. L. R., 7 Cal., 61 (1881) ; distinguishing *Hurronath Bhunjo* v. *Chunni Lall Ghose*, I. L. R., 4 Cal., 877.

[3] *Rambutty Kooer* v. *Ramessur Pershad*, 22 W. R., 36 (1874) ; *Reazat Hossein Khan* v. *Juggannath Singh*, 21 W. R., 419 (1874).

any debts attached ;[1] in the terms, however, only of the order appointing him ;[2] or for contribution on contract ;[3] or for the property of the judgment-debtor.[4]

A receiver cannot waive any right to recover what may be legally claimable, without the sanction of the Court, of which he is an officer.[5]

When a debt alleged to be due by a third party to a judgment-debtor has been attached by the judgment-creditor, the Court may, under section 268, Civil Procedure Code, make an order upon the garnishee for the payment of such debt to the judgment-creditor in case the former admits it to be due, or for so much as he admits to be due to the judgment-debtor. Where, however, the garnishee denies the debt there is no other course open to the judgment-creditor than to have it sold or to have a receiver appointed under section 503.[6]

Held that a Court executing a simple money-decree obtained against a sonless separated Hindu was not competent to appoint a receiver of the rents, accruing since his decease, of the judgment-debtor's immovable property, then in the hands of his widow as her widow's estate, such rents not being assets of the deceased, but the personal movable property of the widow, and this even if the decree-holder had not, as in fact he had, agreed for consideration not to execute his decree against the movable property of the widow.[7]

A receiver does not represent the estate for all purposes ; he would have none of the powers which may

[1] *Id.*

[2] *Benode Behary Mookerjee* v. *Rajnarain Mitter*, 7 C. W. N., 651 (1903); S. C., I. L. R., 30 Cal., 699.

[3] *Sundaram* v. *Sankara*, I. L. R., 9 Mad., 334 (1886).

[4] *Mirza Mahomed Aga Ali Khan Bahadur* v. *The Widow of Balmakund*, L. R., 3 I. A., 241 at p. 245.

[5] *Gopalasami* v. *Sankara*, L. R., 8 Mad., 418, 420 (1885).

[6] *Toolsa Goolal* v. *Bombay Tramway Co., Ld.*, I. L. R., 11 Bom., 448 (1887).

[7] *Rani Kanno Dai* v. *B. J. Lacy*, I. L. R., 19 All., 235 (1897).

be conferred under section 503 of the Code in respect of property belonging to the judgment-debtor not attached in the suit in which the order was made.[1] But in the next mentioned case the whole zemindari was attached, and it was held that the receiver could maintain the suit.

A zamindari was attached in execution of certain decrees against the zamindar, and the plaintiff was appointed receiver with full powers under section 503 of the Code of Civil Procedure to manage the zamindari. Before the appointment of the receiver, the zamindar had expended certain sums at the defendant's request to repair a tank for the irrigation of lands held by them in common with him. This suit was brought to recover the sums so expended. It was objected that the receiver could not maintain the suit on the ground that the sum sued for was neither the subject of a suit against the zamindar nor property attached in execution of a decree against him. *Held*, that the receiver could maintain the suit. It was also contended that the suit, whether viewed as one for contribution or upon a contract, was barred by limitation in respect of all payments made by the zamindar more than three years before the suit, and further that the receiver could only sue the defendants severally for their proportionate shares of the sum claimed. *Held*, that the suit being for work and labour done at their request was not barred by limitation, and that the defendants were jointly and severally liable for the sum sued for.[2]

In cases in which a receiver, appointed at the instance of the judgment-creditor, misappropriates money collected by him, the decree is not satisfied *pro tanto*, but the loss falls on the estate or its owner subject to the receiver's

[1] *Sundaram* v. *Sankara*, I. L. R., 9 Mad., 334 (1886).

[2] *Ib.*

liability.[1] Inasmuch as the judgments in the last mentioned case are instructive as to the general position of a receiver they are here cited in full.

Orr v. Muthia Chetti.

In original suit No. 415 of 1884 on the file of the District Munsiff of Sivaganga, appellant obtained a money-decree against respondent. In execution of the same, the produce of the village of Kumbanur in Fasli 1299 was attached by appellant, and on his application, a receiver was appointed under section 503 of the Code of Civil Procedure to superintend the harvest and to recover the *melvaram*. The receiver collected a sum of Rs. 845-2-7 on account of the *melvaram*, but instead of remitting the amount to the Court misappropriated it to his own use. Thereupon, respondent instituted criminal proceedings against him, and the receiver absconded and was still at the time of the judgment absconding. Appellant then applied for execution against respondent in respect of the balance due under the decree, and the latter contended that the decree must be taken as satisfied to the extent of the sum of money misappropriated by the receiver, from whom, it would appear, no security was taken for the due performance of his office. Both the Courts below disallowed the contention, hence this appeal. The question which arose for determination was, whether in cases in which a receiver, appointed at the instance of the judgment-creditor under section 503, misappropriated his collections, the decree ought to be treated as satisfied *pro tanto*, on the ground that he is the agent of the judgment-creditor on whose application he was appointed. The Court observed as follows :—

"The only case cited at the hearing is that of *John Tiel & Co.* v. *Abdool Hye*.[2] That was decided under

[1] *Orr.* v. *Muthia Chetti*, I. L. R., 17 Mad., 501 (1893).

[2] 19 W. R., C. R., 73.

section 243, Act VIII of 1859. There the manager exceeded the powers conferred upon him by the Court, and mortgaged the attached property with the consent of all the parties concerned, so as to leave some proprietary interest in the judgment-debtor. The question for determination was whether any judgment-creditor coming after the appointment of the manager and the making of the said mortgage, had a right to attach and sell what remained of the judgment-debtor's interest in the property. The Court held that he was entitled to attach, and stated the ground of decision in these terms : 'A manager appointed under Act VIII of 1859, section 263, so far as he is an officer of the Court, is, at the most, the hand of the Court for the purpose of gathering in on behalf of the judgment-debtor the moneys due to him, in order that they may immediately be applied to the satisfaction of the decree. If he does more than this and deals with the subject of the property itself, he must do so as the agent of the judgment-debtor, and not properly as the officer of the Court.' In the case before us, the receiver collected the *melvaram* in the exercise of the power conferred upon him by the Court, but instead of paying the collections into Court, as he was bound to do in order that they might be applied in satisfaction of the decree, misappropriated them to his own use in breach of his duty as receiver. I am of opinion that the Judge is right in holding that the present case is not on all fours with the other case. I do not think, however, that the decision of the Judge can be supported. He considers that the receiver in the present case was the judgment-creditor's agent, because it was on his application that the appointment was made. The appointment is the act of the Court and once made in the interests of justice or *ex debito justitiæ*, he is an officer or representative of the Court, and subject to its orders. His possession

is the possession of the Court by its receiver, and the tenants in possession, when he is appointed to receive rents and profits of immoveable property, become virtually tenants *pro hâc vice* of the Court, their landlord. His possession is the possession of all the parties to the proceeding according to their titles. The moneys in his hands are in *custodia legis* for the person who can make a title to them. The Judge observes that very wide powers are conferred upon receivers by section 503 including a power to remove the property in possession, but it does not follow from it that his relation either to the Court or to all the parties interested in the proceeding undergoes any change in proportion to the extent of his powers. For, it has been held in England in similar cases that a receiver appointed by the Court is appointed on behalf and for the benefit of all persons interested, parties to the suit or proceeding. This being so, it is clear that if a loss arises from the default of the receiver, the estate must bear the loss as between the parties to the suit or proceeding. It is true that when the party entitled to an estate is ascertained, the receiver will be considered his receiver, and this principle is applicable in the case of a suit in which title to property is decreed, and not to the case before me, for the decree under execution is a money-decree, the title in the property under attachment continuing to vest in the judgment-debtor. The first-mentioned rule is only the result of the general principle that the loss must fall on the estate or its owners, subject to the receiver's liability. The terms "receiver" and "manager" are synonymous, and though the appointment of a receiver may, in certain cases, operate to change possession, yet it has no effect whatever on the title of either party to the property which is placed in the possession of the receiver. For any loss arising from his default, the

receiver is certainly responsible, but when he cannot be proceeded against, the question as between innocent parties is who ought to bear the loss which is imputable to neither, and the only answer is that it must devolve on the estate to which the appointment relates. There is also another reason in support of this view. Moneys in the hands of the receiver belong to the Court, which appointed him, and are in *custodia legis*, and he cannot spend them except under the orders of the Court. If they are lost, whilst in custody of the receiver notwithstanding the exercise by him of due care, it cannot be denied that the loss must devolve on the estate, for the loss is not imputable to his default or that of any other. The Courts below are in error in introducing a theory of agency without reference to the title to the property, for the collection of the rents of which the receiver has been appointed. I set aside the orders of both the Courts below and direct that appellant be allowed to execute his decree without being compelled to deduct from the amount thereof, the amount misappropriated by the receiver. Respondent will pay appellant's costs throughout.[1]"

On appeal under section 15 of the Letters Patent the Judges before whom the case came differed in their views.

Shephard, J., said : "The point raised by this appeal is one on which authority is naturally scanty, because it would hardly arise if ordinary care were taken. It seems that, in execution of a decree obtained by the respondent, a receiver was appointed to superintend the harvest and collect the *melvaram* payable to the appellant. It is not explained why such an expensive and cumbrous way of executing an ordinary decree was adopted. The receiver

[1] *Orr* v. *Muthia Chetti*, I. L. R., 17 Mad., 502 (1893), *per* Muttusami Ayyar, J.

thus appointed apparently was not required to give, and anyhow did not give, the security which the 503rd section of the Code requires. He collected certain moneys on account of *melvaram*, but instead of paying them into Court, misappropriated them and absconded. A fresh application having been made for execution, the appellant met it by claiming credit for the moneys so collected, but not paid into Court. The question is whether the appellant, the judgment-debtor, or the respondent, the decree-holder, must bear the loss occasioned by the defalcation of the receiver. Mr. Justice Muttusami Ayyar reversing the order of the Courts below has decided the question in favour of the decree-holder, and I have arrived at the same conclusion. Such authority, as there is, is in favour of it, although it must be admitted that the circumstances of *Lord Massareene's*[1] case were quite different from those of the present case. The case is one which cannot be decided upon any theory of agency. A receiver appointed to collect moneys is not an agent of either party ; he is an officer of the Court deputed to collect and hold the moneys collected by him in accordance with the orders of the Court. The party at whose instance a receiver is appointed has no greater or less control over his acts than the other party to the litigation. It is by the Court only that he can be dismissed as well as appointed. The argument on behalf of the appellant was to the effect that, as he or the tenants indebted to him were bound to pay the *melvaram* to the receiver, so a payment by them must *pro tanto* operate as a complete discharge. Unless such discharge and satisfaction of the decree was effected by the payment, the appeal must clearly fail. What then is there in the provisions of the Code to justify us in holding that a

[1] *Hutchinson* v. *Massareene*, 2 B. & B., 49.

judgment-creditor must be deemed to be satisfied by the mere fact of a receiver getting in moneys due to the judgment-debtor? The ordinary right of a judgment-creditor is to have the amount of his debt paid into his own hands. As to that proposition, I apprehend there can be no doubt; see *Soobul Chunder Law* v. *Rassick Lall Mitter*.[1] The money may be paid out of Court immediately to the judgment-creditor, or it may be paid into Court and taken out by him. Then only is he bound to certify to the Court under section 258 the fact of payment. There is a special provision in the 336th section of the Code entitling the debtor to personal release on his paying the money to an officer of the Court, and there is a similar provision in the 341st section for the case of a debtor in jail paying the money to the officer in charge of the jail. But in the latter section it is expressly declared that a discharge under it does not operate as a discharge of the debtor from his debt. It is a personal discharge only. These provisions, which were relied upon by the appellant's counsel, so far from supporting his argument, rather indicate that, as a general rule, the receipt of money by an officer of the Court is not by itself a good discharge. Payment into Court by the judgment-debtor stands on a different footing. It is expressly recognized by the 257th section, and a debtor, who, on his debt being attached under the 268th section pays the money into Court, is discharged as effectually as if he has paid it to his creditor. In the present case we are not concerned with any question as to the discharge of a third person, nor with the case of a payment made by the judgment-debtor. The money which came to the receiver's hands was collected by him from persons who were indebted to the judgment-

[1] I. L. R., 15 Cal., 202.

debtor. There was no payment by the judgment-debtor either out of Court to the judgment-creditor or into Court. The most that the judgment-debtor can say is that his tenants have paid to the receiver moneys due to him and obtained thereby a good discharge. The Code does not provide that such a payment shall be deemed equivalent to a payment by the judgment-debtor to the judgment-creditor personally. A provision to that effect would be inconsistent with the scheme of the Code and the position of a receiver, for a receiver who has collected moneys due to the judgment-debtor does not hold them for the judgment-creditor. He holds them for the Court in order that the Court may decide regarding them. (See In re *Dickinson.*)[1] Even if the moneys had been paid into Court it would not necessarily follow that the judgment-creditor would have been satisfied. There is an apparent hardship in holding that a judgment-debtor whose tenants have made payments to a receiver may be called upon a second time to pay money in satisfaction of the decree. The answer to that is that, if he thought the receiver was not a person to be trusted, he ought to have insisted on the Court's taking proper security. It is begging the question to say that it was not his business, but that of the judgment-creditor to see that security was given. When once it is admitted that the receiver is not the agent of either party and that the decree-holder, until full satisfaction of the decree has been obtained, is entitled to go on executing his decree, the only question is whether the decree has in fact been satisfied. Is the judgment-debtor in a position to call upon the judgment-creditor to show cause under the provisions of the 258th section? In my opinion the question must be answered in the negative, and therefore the appeal should be dismissed.

[1] L. R., 22 Q. B. D., 187.

The judgment of Davies, J., however, on the other hand, was as follows :—

"A receiver was appointed by the Court under section 503, Code of Civil Procedure, at the instance of a judgment-creditor holding a money-decree to execute his decree by taking possession of and selling crops, or rather the *melvaram* share thereof, belonging to the judgment-debtor. The receiver acted accordingly, but instead of remitting the sale-proceeds amounting to Rs. 845 odd to the Court, he embezzled the amount and absconded. As no security had been taken from the receiver, as it ought to have been, the money is lost and is irrecoverable. The judgment-creditor has now applied to the Court to again recover the decree amount from the judgment-debtor without giving him credit for the amount already collected by the receiver. The question, therefore, is whether the judgment-debtor is liable to pay that amount over again owing to the defalcation of the receiver, or whether the loss must be borne by the judgment-creditor. The District Munsif and the District Judge held that the judgment-creditor must be the sufferer on the ground that the property which was available for the satisfaction of the decree-debt had been taken from the control of the owner, the judgment-debtor, at the instance of the judgment-creditor who had applied for the appointment of the receiver, and had not seen that due security was given by him, whereas the judgment-debtor was in no way to blame. The learned Judge of this Court has held to the contrary, ruling that the loss occasioned by the receiver's default must, in accordance with English precedents, fall upon the estate, and as the estate in this case was the estate of the judgment-debtor, it was the judgment-debtor who must bear the loss. The rule is no doubt equitable enough where the parties have all got an interest

in the estate, because the loss is shared by them all, but here the case is quite different. In this Court, it is urged, on the one hand, that the receiver should be treated as the agent of the judgment-creditor, as it was on his motion the receiver was appointed, and as it was the judgment-creditor's fault that due security was not taken, he should bear the loss. On the other hand, it is argued that the decree-debt has not been satisfied, and the judgment-debtor's liability to pay it lasts until the judgment-creditor is actually paid the money due. The solution of the difficulty appears to me to lie in the determination of the question as to when a judgment-debtor is to be considered discharged of the decree-debt, and the correct answer is, in my opinion, when he has paid the money into Court, or out of Court to the decree-holder, or otherwise, as the Court directs. Section 257 of the Civil Procedure Code is my authority for the proposition. It directs that "all money payable under a decree shall be paid" in one of the three modes stated above, and although there is no express declaration that such payment operates as a discharge of the decree-debt, it seems obvious that when the judgment-debtor has paid the money payable by him in the manner in which the law directs him to pay it, he can do no more, and is henceforth absolved from further liability, or in other words, has discharged his debt. It will be conceded that a payment direct to the decree-holder—the judgment-creditor himself, subject of course to the certificate required by section 258 to be given to the Court—is a valid discharge, and we find classed with such valid discharge, two other alternative modes of discharge, entirely free from any condition or proviso such as payment out of the Court to the decree-holder is subject to. The three modes of payment being classed together as alternative courses

courses, they must be taken to be of equal efficacy, and when one course is shown to have the effect of a discharge, it follows that the others have the same effect. I take it therefore that there is a distinct implication from the directions in the section itself, that a payment into Court, or otherwise as the Court directs, of the money 'payable under a decree' is an absolute discharge of the judgment-debtor as it is unconditional, just as a payment to the decree-holder becomes a complete discharge on compliance with a subsequent condition. It must be remembered that the Court holds money so paid into it to the credit of the decree-holder, as there are various provisions of law indicating that a payment into Court by a debtor is tantamount to a payment to the party entitled to receive it. I may instance the case of a garnishee which seems directly in point. The payment of the amount of his debt into Court 'shall discharge him as effectually as payment to the party entitled to receive the same' as declared in section 268 of the Code of Civil Procedure. Then there are the cases of payment of a deposit into Court (*a*) by a defendant under section 376 of the Code of Civil Procedure which is regarded under the following section as held by the Court on plaintiff's account to whom it shall be payable, and (*b*) by a mortgagor under section 83 of the Transfer of Property Act which is held 'to the account of the mortgagee.' Decrees for foreclosure and redemption drawn up under sections 86 and 92 of this Act also provide for payment into Court as being equivalent to payment to the plaintiff or the defendant as the case may be. Supposing that in any of these cases the money paid in were to be misappropriated by a servant of the Court or of the bank or treasury where the money was kept, it surely could not be contended that the depositor, or the person who had made the payment under

the decree, was bound to make good the loss by paying twice over. It would, indeed, be a case of *bis vexari* if the Court should issue process to recover an amount already paid to it. This convinces me that payments made into, or by order of, Court under plain directions of the law are good and valid discharges of the debts on account of which the Court itself undertakes to receive them, and that any loss accruing thereafter cannot be charged to the person making the payment, and if anybody is to be held responsible, it must be the officers of the Court or their master the Government. If payments into Court or payments made as ordered by the Court are valid discharges, as in my opinion they are, the further question arises in this case whether the receipt by the receiver of the money which he had realized by sale of the judgment-debtor's property amounted to a payment under direction of the Court, for it is not pretended the money ever reached the Court, so as to be deemed as having been paid into it. Now I presume that payments made to bailiffs executing a warrant of arrest or a warrant of attachment and authorized to receive them, would be considered cases falling under clause (*c*) of the section 257 as payments made 'otherwise as the Court directs.' These processes against the person or the property of the judgment-debtor are issued under the authority of section 254 of the Code, and the forms are to be found in the fourth schedule Nos. 136 and 154. Each form provides for payment being made by the judgment-debtor to the process-server of the amount of the decree and costs of execution, in which case the warrant ceases to have effect, the judgment-debtor being released from custody in the one case or his property in the other, these directions being more expressly given in sections 336 and 275 of the Code itself. This latter section is instructive as showing that payment

into Court is a satisfaction of the decree so far as the judgment-debtor is concerned, as may be gathered from the wording, 'if the amount decreed with costs, &c., be paid into Court, or if satisfaction of the decree be otherwise made through the Court.' But this is by the way. From the references made it cannot be doubted that a payment to an officer of the Court, under direction of the Court, is as effectual as a payment made directly into Court. The case of a receiver seems precisely on the same footing. He is an officer of the Court equally with a bailiff or a process-server, and he collects the money due under the decree also by direction of the Court, and payment to him is therefore as good and valid as to the Court itself, falling as it does under clause (*c*) of section 257. In this view I come to the conclusion that the judgment-debtor, appellant in this case, has discharged the decree-debt in execution to the extent of the Rs. 845 and odd of money collected by the receiver, and that execution can proceed only for the balance due if any. I would therefore reverse the decision under appeal and restore that of the District Munsif with appellant's costs throughout to be paid by the respondent. It appears that the appointment of the receiver was made by the Munsif without the express authorization of the District Court, which is required by section 505 of the Code, but as the appointment has been treated throughout as a valid one, its validity cannot well be questioned at this late stage of the case; at any rate it is a matter to which the principle of *quod fieri non debet factum valet* may most appropriately be applied."

In consequence of this difference of opinion the case was referred to the Full Bench, consisting of Collins, C. J., Shephard and Davies, J.J., who delivered the following judgment:—"The appellant not being represented

and not appearing, we dismiss the appeal with costs. Under the provisions of section 575, Civil Procedure Code, the order of this Court, dated 24th January 1891, in *Orr* v. *Muthia Chetti*[1] prevails, and the order of the District Court of Madura, dated 26th August 1892, passed on C. M. A. No. 8 of 1892, is reversed with costs."

Removal of receiver.

§ 27. If grounds be shown for such a course, the receiver who has been appointed may be removed upon the application of the parties. A Judge ought not, however, to remove a manager who has been appointed after hearing both sides, summarily, and without assigning reasons simply at the request of the decree-holder. When a Judge did so, his order was set aside the Court stating that its order would not prevent the Judge from thereafter removing the manager should he show sufficient reasons for the removal. The Court also set aside a subsequent order allowing sale of other properties attached, which properties were placed along with the others in the hands of the manager.[2] And if where a manager has been appointed and after a lapse of a reasonable time it appears that the collections are insufficient to meet the claims of the creditors, there is no reason why an application should not be made by the decree-holder for the removal of the manager and the sale of the property.[3] Where a manager had not filed accounts and the Judge found that the management could not be continued with any prospect of the debt being paid within three years, he was held to have done right in removing the manager and ordering the property to be sold.[4]

[1] *Muthia Chetti* v. *Orr*, I. L. R., 20 Mad., 225 (1897).

[2] *Huree Sunkur Mookerjee* v. *Jogendro Coomar Mookerjee*, 19 W. R., 66 (1873).

[3] *Bunwaree Lall Sahoo* v. *Girdharee Singh*, 16 W. R., 273, 274.

[4] *Huree Sunkur Mookerjee* v. *Jogendro Coomar Mookerjee*, 22 W. R., 220 (1874).

CHAPTER V.

Rights and Powers: Duties and Liabilities of a Receiver.

§ 28. Rights and Powers—(*a*) General—(*b*) Discretion—(*c*) Application for instructions—(*d*) Power to appoint deputies and assistants—(*e*) Possession—(*f*) Leases—(*g*) Sales—(*h*) Borrowing—(*i*) Payment—(*j*) Suits and applications by—(*k*) Indemnity—(*l*) Salary and allowances—(*m*) Lien.

§ 29. Duties and Liabilities—(*a*) Amenability to Court—(*b*) Duty of obedience—(*c*) Non-liability in respect of acts done under order—(*d*) Impartiality—(*e*) Duties generally—(*f*) Liability for loss—(*g*) Liability on covenants—(*h*) Information to be given to Court—(*i*) Duty to account.

Rights and powers.

§ 28. It may be said in a general way that a receiver has no powers except such as are conferred upon him by the order by which he is appointed and by the practice and usage of the Court. He is merely an officer of the Court: his holding is the holding of the Court: he is but a minister and therefore has not the discretionary power of a person acting in a fiduciary character. In theory the Court itself has the care of the property in his hands. He can do nothing likely to seriously diminish the fund without special leave of Court. He is not, however, merely the assignee of him whose property is placed in his care, but he may exercise such power in dealing with the property as belong to a receiver according to the practice of the Court and as are particularly conferred upon him by the order of his

(*a*) General.

appointment.[1] Under the Code the Court may grant to the receiver all such powers as to bringing and defending suits and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of instruments in writing *as the owner* himself has or such of those powers as the Court thinks fit.[2] Under the usual form of High Court order a receiver is appointed with power to get in and collect the outstanding debts and claims and with all powers provided for in section 503, clause (*d*) of the Code except that he must not, without the leave of the Court, (1) grant leases for a term exceeding three years, (2) bring suits in a District Judge's or Subordinate Judge's Court except suits for rent, or (3) institute an appeal in any Court (except from a decree in a rent-suit) when the value of the appeal is over 1,000 rupees, or (4) expend in the repairs of any property in any period of two years more than half of the nett annual rental of the property to be repaired, such rental being calculated at the amount at which the property to be repaired would let when in a fair state of repair. A receiver is at all times subject to the control of the Court which possesses the power to make all necessary orders for the control of receivers appointed by it.[3] He has a right to the protection of the Court, and his possession will not be allowed to be disturbed.[4] The Court will see that he carries out his functions and will protect the agent appointed under its order.[5]

The scope of the receivership may be extended. Where a receiver had been appointed by consent to receive

[1] Beach, § 249.
[2] Civil Procedure Code, s. 503.
[3] Beach, § 260.
[4] *Ib.*, § 266, v. *ante*, Ch. II, § 16.
[5] *Dinonath Sreemonee* v. *Hogg*, 2 Hay, 395, 397 (1863).

the rents of immoveable property belonging to the estate, and a rule *nisi* was issued to show cause why the receiver should not take possession of all the estate, the Court extended the power of the receiver by appointing him receiver to recover and take possession of all the cash and moveable property belonging to the deceased.[1]

When the receiver has obtained possession he may and should, under the sanction of the Court when necessary, do all such acts of ownership as to the receipt of rents, compelling payment of them, management and letting the lands and houses, and otherwise making the property as productive for the parties to be ultimately declared entitled thereto as the owner himself could do if he were in possession. Where the order directs that the receiver shall make payments he must, when complying with the order, take proper receipts which must be produced when he passes his accounts. He is only justified in paying the person named in the order for payment or on a power of attorney duly executed by him. When he is appointed over personal property it will be his duty to collect all he can get in. When a receiver is also appointed to manage as in the case of a receiver of a partnership concern he must be guided by the terms of the order of appointment, keeping in mind the general maxim that, as his authority flows from the Court, he must in all cases act under a special order to be obtained from the Court.[2]

Where a decree or order, not solely for costs of suit, has been made by the Court, under which any sum of money or any other thing shall be payable to or receivable by an infant or a person of unsound mind not so found by inquisition, every such sum of money or thing shall, unless

[1] *Yeshwant Bhagwant Phatarpakar* v. *Shankar Ramchandra Phatarpakar*, I. L. R., 17 Bom., 388 (1892).

[2] Kerr, 176, 180, 181, 186.

the Court shall otherwise order, be paid or delivered to the receiver of the Court whose duty it shall be to receive or realize or obtain possession of and hold the same on behalf of such infant or person of unsound mind.[1]

(b) Discretion.

In many matters connected with the care and management of the property entrusted to them, receivers are allowed to use their own discretion subject however to the control and approval of the Court. Such approval may usually be had if it appear that the receiver acted in good faith and for the benefit of the parties in interest.[2] But in all important matters a receiver should apply for and obtain the direction of the Judge who appoints him.[3] A receiver, however, must do no act which may involve the estate in expense without the sanction of the Court. So he may not defend actions or bring ejectment without leave. He may with propriety insure the property and lay out small sums in customary repairs, but where the amount is large, or if either from their amount, or the circumstances under which the monies for repairs are claimed, the receiver feels any difficulty in allowing them, he should apply for sanction as he should also do in other cases which are not matters of discretion, or where it is felt that the Court's direction is required in the management of the estate.[4] As regards repairs, the receiver must not, under the usual form of High Court order, without the leave of the Court, expend in the repairs of any property in any period of two years more than half of the nett annual rental of the property to be repaired, such rental being calculated at the amount at which the property to be repaired would let when in a fair state of repair. The

[1] Belchambers' Rules and Orders, 644.

[2] Beach, § 256.

[3] *Balaji Narayan Pavardhan* v. *Ramchandra Govind Kanade*, I. L. R., 19 Bom., 660, 662 (1894).

[4] Kerr, 192-196.

application of the funds which the receiver holds strictly subject to the direction of the Court and the entering into contracts are not matters of discretion. Although as an individual he may bind himself, yet in order to affect the funds in his hands, his acts must be ratified by the Court.[1]

(c) Application for instructions.

A receiver has a right to apply to the Court for instructions when a question arises as to what may be his duty under its orders. This right grows naturally out of the fact that he is an officer of the Court and subject to its directions and is charged with responsible and often embarrassing duties. He is entitled to advice from the Court upon all questions of difficulty or intricacy and may make application for it on all suitable occasions without hesitation. It has been more forcibly said that he is bound in all cases of doubt and especially of conflicting interests or claims to take the direction of the Court. The application for instruction may be made without notice to the parties interested in the fund, though where there is no necessity for immediate action it is the better practice not to apply *ex parte*.[2]

(d) Delegation.

A receiver is not justified in delegating or entrusting to another a duty entrusted to him by the Court. If he does so and thereby causes loss to the estate, he is bound to make it good.[3] So where a receiver employed three successive *Karkuns* without security and left to each of them the absolute and uncontrolled management of the estate, and the custody of its funds with the consequence that one of them made use of the whole of the collected

[1] Beach, § 257.

[2] Beach, § 259: a receiver may employ counsel: but usually the counsel or solicitor of either of the parties should not be employed, *id.*, §§ 261, 263.

[3] *Balaji Narayan Pavardhan* v. *Ramchandra Govind Kanade*, I. L. R., 19 Bom., 660 (1894).

funds for his own purposes and destroyed or manipulated the accounts, the receiver was held to be accountable.[1]

The question whether he is entitled to employ others to assist him depends, if the terms of the order appointing him are silent on the subject, upon the nature of the estate and must be determined in each case with reference to its own circumstances. No general rule can be laid down; but whether he be allowed an assistant or not, the receiver must himself perform the proper duties appertaining to his office. These he cannot delegate.[2] If the estate over which the receiver is appointed be at a distance, he may appoint his own agent.[3] So also if he needs assistance in removing the property of which he is entitled to the possession he may employ such as is necessary, at the expense of the fund in his hands.

A receiver of partnership property has no power except by special order of Court, to appoint a deputy receiver to be paid out of the fund in his hands, but he may appoint a competent person to take charge of and wind up the business and a reasonable number of keepers for the protection of the property and pay them out of the fund a reasonable compensation. If he be empowered to continue the business over which he is appointed, he may employ such person as may be necessary for this purpose, and the Court will not interfere with his discretion in this respect unless some abuse is shown. The responsibility for the selection of proper employees rests on the receiver.[4] The distinction appears to be that whereas the receiver cannot place on other shoulders the duties which lie directly on him to perform, he can employ assistance to aid him in carrying out those duties.

[1] *Balaji Narayan Pavardhan* v. *Ramchandra Govind Kanade*, I. L. R., 19 Bom., 660 (1894).

[2] *Ib.*

[3] —— v. *Lindsey*, 15 Ves., 91.

[4] Beach, § 265.

It is usual and more prudent, however, to apply to the Court for its sanction of the proposed establishment, and if any questions of difficulty or responsibility arise with regard thereto to seek the direction of the Court. A receiver in whom the Court confides is not entitled to mix up with his delegated authority another person who is a total stranger to the Court. In a case accordingly where the receiver, in order to obtain sureties, had agreed that the money to be collected from the property over which he was receiver should be handed over to a person who was the partner of one of the sureties, and be deposited with bankers in the joint names of the sureties, and that all drafts upon the monies so deposited should be written by the aforesaid partner and signed by the receiver, it was held that the receiver was liable for the loss occasioned by the failure of the banking house in which the money had been deposited.[1] If a receiver puts a fund out of his control so that other persons shall be able to deal with it he guarantees the solvency of those persons and becomes answerable for any loss that may ensue. It is immaterial that he may not have so parted with the control as to enable the other person to deal with it without his concurrence, if he has parted with his exclusive control, by associating with himself the authority of another person. If, indeed, a receiver parts with his control over the fund, by introducing the control of an irresponsible person, who is unknown to the Court, it seems that he shall be answerable for what has happened to the fund which he has so dealt with, not merely where the peril can be shown to be the cause of the loss, but where he has not conducted himself as a prudent person would have done.[2]

[1] *Salway* v. *Salway*, 2 R. & R., 214, 219; Kerr, 203.

[2] *Ib.*

(e) Possession.

According to the usual form of order it is ordered that the plaintiff and the defendant and all persons claiming under them do deliver up quiet possession of the property, moveable or immoveable, together with all leases, agreements for lease, kabuliats, account books, papers, memoranda and writings relating thereto to the receiver: and it is further ordered that the receiver do take possession of the property, moveable and immoveable, and collect the rents, issues and profits of the immoveable property, and that the tenants and occupiers do attorn and pay their rents, in arrear and growing rents to the receiver. It is both the receiver's power and duty to take possession of the property whether moveable or immoveable over which he is appointed. Where a receiver is appointed by the Court to get in outstanding personal property it is his duty to collect all he can get in. The power of a receiver to take property implies a correlative duty on the part of any one having it in possession to deliver it to him, and such holder violates the law in resisting the exercise of the lawful authority of the receiver. Where parties to the record are directed by the order to deliver up to the receiver the possession of such parts of the property as are in their holding, the receiver as soon as his appointment is complete should apply to all such parties to deliver up possession accordingly. If any of them refuse, it is usual to serve such party personally with the order, and if possession is still withheld, the receiver must apply to the Court which will give its assistance in obtaining possession of property which is the subject-matter of the receivership. The order appointing a receiver of outstanding personal estate generally comprises a direction that the parties in whose possession the same may be shall deliver over to the person appointed to be receiver all securities in their possession for such

outstanding personal estate together with all books and papers relating thereto. If such parties refuse, application must be made to Court for the purpose of enforcing the order. When third persons who are indebted to the estate refuse to pay the amount due by them, sanction must be obtained from the Court to sue them.[1] The Court may remove the person in whose possession or custody the property may be from the possession or custody thereof and commit the same to the custody or management of the receiver.[2]

(*f*) Leases.

If tenants in possession of property over which a receiver is appointed are directed by the order to attorn to him, the receiver should, as soon as his appointment is complete, call on them to attorn accordingly, and if they refuse, application should be made to the Court. The receiver is entitled to all the rents in arrear at the date of his appointment and to all the rents which accrue during the continuance of his receivership and an order will, if necessary, be made for payment. After the tenant has attorned to the receiver and so created a tenancy between him and the receiver, the latter may distrain upon the tenant in his own name and on his own authority without leave obtained from the Court.[3] Where the receiver is appointed of leaseholds, upon him devolves the performance of the obligations imposed by the possession of land: therefore he must out of the sub-rents discharge the head rents, and when these are discharged, distribute the surplus according to the interest of the parties in the cause and the order of the Court.[4]

A receiver appointed to collect the rents of an estate should, whether he employs a subordinate or not, receive

[1] Kerr, 176—184. Beach, § 253; High, §§ 144, 145.

[2] Civ. Pr. Code, s. 503, cl. (*b*), (*c*.)

[3] Kerr, 177—183.

[4] *Ib.*, 197-198.

the rents as they are from time to time collected on his behalf, if he does not himself recover them, and keep them under his own control in a bank to a separate account or in some other secure place of deposit and pay out such sums as from time to time may be required for current expenses and repairs and personally or by a subordinate keep correct and accurate accounts of the receipts from and expenditure upon the estate, obtaining vouchers for all, other than petty sums, paid. He is bound to make good a loss caused to it by a breach of his duties.[1]

When the receiver is informed by the tenants that the defendants have interfered with the rents, it is his duty to move the Court for an attachment.[2] The abatement of the suit does not affect or determine the appointment of a receiver or suspend his authority to proceed against the tenants. His authority continues until an order is made for his removal until which time he may distrain or perform his other duties notwithstanding the abatement.[3] The power which a receiver possesses in English law[4] to give notices to quit is applicable to tenancies, the period of which expire during the incumbency of the receiver. The powers of a receiver in this regard were fully discussed in the cases next mentioned.

In the undermentioned case,[5] D was appointed receiver in a partition suit pending in the High Court by an order which, amongst other things, gave him power to let and set the immoveable property, or any part thereof as he should think fit, and to take and use all such lawful and equitable means and remedies for

[1] *Balaji Narayan Pavardhan* v. *Ram Chandra Govind Kanade*, I. L. R., 19 Bom., 660, 661, 662 (1894).

[2] Kerr, 198.

[3] *Ib.*, 184.

[4] *Ib.*, 191.

[5] *Drobomoyi Gupta* v. *C. T. Davis*, I. L. R., 14 Cal., 323 (1887).

recovering, realizing and obtaining payment of the rents, issues and profits of the said immoveable property, and of the outstanding debts and claims by action, suit, or otherwise as should be expedient. D, without special leave of the Court, served a notice to quit on certain tenants of the estate, who claimed to hold a permanent lease, and afterwards instituted a suit to eject them, also without special leave of the Court. *Held*, that the order appointing him did not give him power to serve such notice or to institute such suit without the special leave of the Court, and that as he was appointed under the provisions of section 503 of the Code of Civil Procedure and not vested with the general powers referred to in that section, but only with the powers referred to in the order appointing him, and as a receiver is not otherwise authorized to institute such suits without special leave of the Court, the suit must be dismissed.

During the course of the judgment the Court observed as follows :—

Drobomoyi Gupta v. *Davis.*

"The question therefore is whether, by the terms of the order of the High Court, dated the 11th August 1881, appointing Mr. Davis as receiver, he was authorized either to issue a notice to quit, the tenants holding under a permanent lease, or to follow up that notice by an action for ejectment without further special permission from the Court. With reference to this point we may observe that when the learned Counsel for the appellants first opened it, we heard the Counsel for the respondents before going further into the case ; and we then decided to hear the appeal on all the points raised, upon the express understanding that before the close of the case an application should be made on behalf of all the plaintiffs-owners, adopting the action of the receiver, and agreeing to be bound by the result of the trial. But no such

application has been made. Some days after the hearing had terminated, a petition was tendered signed by some of the owners plaintiffs, but not by all. It is obvious that an action for ejectment cannot be maintained by some only of the owners of an undivided estate. We were, therefore, unable to take cognizance of that petition, and the question already stated must be decided. We have been referred to English cases as showing what a receiver may do of his own authority and what he may not do without the permission of the Court. The order of appointment which is printed at pages 55 and 56 of the paper book, authorises the receiver to take possession of the property, movable and immovable, of the estate, and amongst other things, authorises him to let and set the said immovable property or any part thereof as he should think fit. Mr. Evans for the respondent referred us to Kerr on Receivers, and pointed out a passage at page 151, showing that a receiver appointed by the Court with general authority to let the lands from year to year has thereby also an implied authority to determine such tenancy by a regular notice to quit. He referred us to the cases mentioned in the footnote to page 151, as authority for this doctrine. These cases, however, appear to us to refer only to tenancies of the nature there described, namely, tenancies from year to year, or other tenancies, *the periods of which expire during the incumbency of the receiver.* The words "to let and set" in Mr. Davis' appointment order cannot, we think, give him as receiver any implied authority to interfere with tenures which, upon the face of them, are *permanent.* We think that to authorise him to issue such notice, special consent of the Court would be necessary. Mr. Davis must have been appointed receiver under the provisions of section 503 of the Code of Civil Procedure ; and no doubt

the Court could have, had it seen fit, granted to him under that section all such powers as to bringing and defending suits, and for the realization, management, etc., etc., of the property as the owner himself had, or such of those powers as the Court thought fit. And if the order of his appointment had been drawn up in the form prescribed in the fourth schedule to the Code, that is, in the form No. 168 of that schedule, there would have been no difficulty in the receiver's way in the present suit, for the form in question gives a receiver *full* powers under the provisions of section 503. But the order was not drawn up in that form; it was drawn up in the old form which prevailed at the time of the Supreme Court, and which, as we are informed, has ever since been in use. Instead of having full powers under section 503, the receiver has the limited powers expressly given by the order of appointment. And we find in that order no words upon which we could hold that he was authorised to serve upon the defendents a notice to quit the tenure which they obtained from Rasmoni. Then it was contended by Mr. Evans for the respondents that the words of the order are sufficiently large to give the receiver power to bring this suit to eject, for the order authorises the receiver to enforce claims by action, suit, or otherwsie. He submitted that the words "claims" is sufficient to cover the present suit, the matter in dispute being a claim to a portion of the landed property. We are, however, unable to adopt this construction. The passage in which this word occurs is as follows: 'And to take and use all such lawful and equitable means and remedies for recovering, realising and obtaining payment of the said rents, issues, and profits of the said immovable property, and of the outstanding debts and claims by action, suit, or otherwise.' These are the objects for which he is

authorised to bring suits, and a suit to eject tenants and to take possession of land is not a suit for obtaining payment of a claim. That being so, it appears to us clear that the proceedings of the receiver in this matter, both as to the notice to quit and as to the bringing of this suit for ejectment, were unauthorised and of no effect against the defendants. This finding would of itself be sufficient to dispose of the suit, but as this is a case appealable to Her Majesty in Council, we think it our duty to express our opinion upon the other points raised."[1]

This case was subsequently distinguished in a later one,[2] in which the order appointing a receiver gave him power "to let and set the immoveable property or any part thereof as he shall think fit, and to take and use all such lawful and equitable means and remedies for recovering, realizing and obtaining payment of the rents, issues and profits of the said immoveable property, and of the outstanding debts and claims, by action, suit or otherwise as shall be expedient." *Held* under the terms of such order, the receiver has power to sue to eject, without obtaining permission of the Court, a *monthly tenant* whose tenancy was determinable by a notice to quit, which had been duly served. In its judgment the Court said :— *Hari Das Kundu* v. *Macgregor.*

" The only question raised for our decision—and this point was raised in both the lower Courts—is whether the suit has been brought by the receiver under proper authority. We have been referred to the case of *Drohomoyi Gupta* v. *Davis*,[3] as a precedent for holding that this same receiver was found incompetent, without permission of the Court, to sue for the ejectment of a

[1] *Drobomoyi Gupta* v. *C. T. Davis*, I. L. R., 14 Cal., 323 and 339—341 (1887).

[2] *Hari Dass Kundu* v. *J. C. Macgregor*, I. L. R., 18 Cal., 477—481 (1891).

[3] I. L. R., 14 Cal., 323.

tenant under the terms of his appointment. We are not disposed to disagree with the rule laid down in that judgment, but we think that it is inapplicable to the present case. That was a suit for the determination of a tenancy of a *permanent* character. In the present case it has been found that the interest of the tenant was merely temporary and determinable by a notice to quit, which has been served. These two cases, therefore, are not identical. We have also been referred to a long series of cases decided in the Courts in England, quoted in Kerr on Receivers, pages 151 and 152. We observe that in all those cases the power of the receiver was questioned before the Court by which he was appointed. In only two of those cases was the objection raised by the party against whom the receiver was proceeding. In all the other cases the decision of the question only affected the receiver's right to charge his costs in the action against the estate. In the two cases to which reference has been made, *Wynne* v. *Lord Newborough*[1] and in a later proceeding between the same parties,[2] where the objection was raised by the parties against whom the receiver was proceeding, it was held that such persons had no valid interest to object, and their applications were refused. Having regard to the terms of the order appointing the receiver, we think that they are sufficient to confer on him the power to bring a suit to eject a tenant having only a temporary interest, such as a monthly tenant in the case before us whose tenancy has been determined. We have been referred to the case of *Miller* v. *Ram Runjun Chuckerbutty*,[3] and although we may say that we do not altogether agree in the general terms of that decision, we find that it is not in point, as

[1] 3 Browne's C. C., 87.
[2] 1 Ves. Jun., 164.
[3] I. L. R., 10 Cal., 1014.

it affects the right of a party to proceed against a receiver without permission of the Court appointing him.[1]"

As regards the power of leasing it is created by the order appointing the receiver who has no estate or interest in himself which enables him to lease. It is common to grant such powers of lease for a limited period, usually three years, but whenever it is desired to lease for a longer term the sanction of the Court must be obtained.[2]

When the receiver being empowered only to lease for three years made settlements with ryots for nine, and it was urged on his behalf that there was a custom in the zemindary to give leases for terms of nine years and that the leases had benefited the estate inasmuch as occupancy-rights had been destroyed, the Court observed that there was no doubt that the receiver could not lease for a term exceeding three years and that it would be improper for him to act in excess of authority and grant leases for a term longer than that for which he had power to grant them; that whatever the custom might have been, the receiver's power were limited; and that if nine years' leases were for the advantage of the estate, the receiver might have come to the Court and asked for permission to grant them; that it was a somewhat extraordinary doctrine to lay down that, provided that the estate be benefited, a receiver may exceed his powers, and in short do what he likes.[3]

[1] *Hari Dass Kundu* v. *J. C. Macgregor*, I. L. R., 18 Cal., 477—481.

[2] Under the general permission the receiver may in his discretion let out property but not for any period exceeding three years without obtaining special permission: Belchambers, R. and O. Note to R. 20; *Krishna Chunder Ghose* v. *Krishnosokha Ghose*, Order dated 20th May 1878.

[3] *Gonesh Chunder Doss* v. *Troyluckonath Biswas*, *Re* C. T. Davis, Suit 294 of 1881, Cal. H. C., O. O. C. J., *per* Trevelyan, J., 23rd March 1887.

A receiver must let to the best advantage and obtain the best terms.[1] He may not either in his own name or through the medium of a trustee become a tenant of any part of the estate over which he is acting as receiver.[2]

A party in whose favour a receiver has, under order of Court, agreed to execute a lease, may, though not a party to the suit in which the order has been passed, apply on summons that the lease may be completed. It is not necessary that a suit should be brought for specific performance. The Court has power to summarily enforce the contract made by it when managing the estate, and it makes no difference that the Court has ceased to manage the estate before such contract is carried out by reason of the dismissal of the suit.[3] So in the case last mentioned the Court passed summarily such an order on the application of a lessee not a party to the suit in which the order completing the agreement for lease had been passed and at a time when such suit was no longer in existence. In the undermentioned suit the receiver appointed was given liberty to lease portions of the estate to the highest bidder whether shareholder or not. After certain negotiations certain of the shareholders bid at the auction for the lease, signed an agreement and made the necessary deposit under the impression that the receiver had agreed to accept the share of the proposed lessees as security. Subsequently differences arose both as to the terms of the lease and the nature of the security required. The parties claiming to be entitled to the lease moved in the suit in which the receiver was appointed for an order that the receiver should grant to the applicants a lease under terms and conditions read out to intended lessees at the

[1] *Wynne* v. *Lord Newborough*, 1 Ves. Jr., 164.

[2] Kerr, 189.

[3] *Surendro Keshub Roy* v. *Doorgasoondery Dossee*, I. L. R., 15 Cal., 253 (1888).

auction on the security offered by them or on their furnishing such further security as the Court should require, and in the alternative if not entitled to a lease for an order that the money deposited with the receiver might be returned and also for an order that the receiver might be discharged as regards the applicants 16-30 share of the joint estate and the applicants put in possession thereof. It was objected in the first place that the application was not in form, and that the proper course for the applicants was to institute a regular suit against the receiver for specific performance if there was a contract capable of being enforced and not by motion. This point was, however, not argued at the hearing, and the Court heard and disposed of the application on the merits dismissing the same so far as it asked for an order that the receiver should execute a lease or for a discharge in respect of the share of the applicants, it appearing that an order had already been made for partition.[1]

It has been held in England that a receiver cannot raise the rents on slight grounds without the leave of the Court;[2] nor can he abate the rents or forgive the tenants their arrears without the consent of the parties beneficially interested.[3]

An alienation being made *pendente lite*, is not void.[4] The rule as to the effect of a pending suit on the rights of a party to that suit is stated by Lord Cranworth, in *Bellamy* v. *Sabine*,[5] as follows:—"When a litigation is pending between a plaintiff and a defendant as to the

[1] *Suttya Sunkur Ghosal* v. *Rani Golapmoney Dabee and others*, Suit 568 of 1871, Cal. H. C. O. O. C. *Cor.* Ameer Ali., J.

[2] *Wynne* v. *Lord Newborough*, 1 Ves. Jr., 164.

[3] Kerr, 189, 190; *Evans* v. *Taylor*, Sau. and Sc., 681.

[4] *Nilmadhub Mundul* v. *Gillander*, 2 Sev., 955.

[5] *Bellamy* v. *Sabine*, 26 L. J. Ch., 797.

right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding not only upon the litigant parties, but on those who derive title under them by alienation made pending the suit, whether such alienees had or had not notice of the pending proceedings." The cases amount to no more than this, that the suit may be carried on without bringing before the Court a purchaser *pendente lite*. And such purchaser is bound by the decision that may eventually be made against the person from whom he derives title.[1]

In the lastmentioned case in which a lease was granted by the receiver: the Court said, "Now a receiver has no estate or interest in himself, his power to grant leases is created simply by the order of the Court appointing him, binding and operating upon the estates of those who are parties to that order, and against whom it is made, but not affecting those persons who, like the now defendants, were not before the Court. In *Daly* v. *Kelly*,[2] Lord Eldon pointed out that 'if a bond-creditor proceeds against a devisee-at-law, he takes execution against the land, but if he proceeds in equity, he gets satisfaction out of the land by sale for as much as is due, and then the conveyance must be executed by him who has the legal estate; and if there is an alienation pending the suit, though that would not prejudice the plaintiff, yet the alienee must be brought before the Court in some shape or other.' In *Gaskell* v. *Durdon*,[3] Lord Manors while asserting the power of the Court to give a plaintiff the benefit of his final decree, by injunction against a purchaser *pendente lite*, points out that he could not compel the tenant to deliver up the lease to be cancelled, or direct a re-conveyance without a bill for that purpose against

[1] *Nilmadhub Mundul* v. *Gillander*, 2 Sev., 955.

[2] 4 Dow., 435.

[3] 2 Ball and Beaty, 170.

such purchaser. It follows that the Court would not have compelled the now defendants to concur in the lease to Mr. Gillanders without bringing them before the Court, and, by parity of reasoning, would not, and could not, have empowered their own officer, the receiver, to grant a lease which would only operate out of the estate of the now defendants without bringing them before it, and giving them an opportunity of being heard. And *a fortiori* the receiver should not of his own authority be allowed, while the result of the suit was yet uncertain, to take upon himself to grant a lease to operate out of the purchased estate, and in effect, defeat it." [1]

If after a receiver has been appointed a person has entered into an agreement to take a lease an action need not be brought to restrain the lessee from committing waste ; the Court will upon the application of the plaintiff in the cause grant an injunction in motion on a summary way though he was not a party to the suit.[2]

In the undermentioned case the practice of the Original Side of the High Court was followed in recognising the right of a purchaser at a receiver's sale to obtain the assistance of the Court in obtaining possession under the provisions of the Code relating to sales in a suit.[3] (g) *Sales.*

In, however, a previous case where an application was made by the Court Receiver the Court (Macpherson, J.), observed as follows :—" This is an application made upon petition by Mr. Hogg, the Court receiver, for an order that the purchaser of certain property which was sold by the receiver, under an order of Court, do complete the purchase according to the conditions of sale ; and that, *Chandranath Biswas* v. *Biswanath Biswas.*

[1] *Nilmadhub Mundul* v. *Gillander*, 2 Sev., 956, 957.

[2] Kerr, 196.

[3] *Minatoonessa Bibee* v. *Khatoonessa Bibee*, I. L. R., 21 Cal., 479 (1894).

in default, he may be attached, or a resale of the property at his risk may be ordered. The application is opposed on various grounds. The first is that the sale not being by the Court, the receiver has no right to make a summary application of this description, but must enforce his rights, such as they are, by bringing a suit against the purchaser. For the receiver, it is contended that as he is an officer of the Court, and the sale took place under an order of Court, the application is properly made. It is clear that the Court cannot act against a person who is not a party on the record, unless he has come in and done some act which subjects him to the jurisdiction of the Court in this suit. The purchaser's position thus depends on whether the contract he entered into was entered into in the course of a sale by the Court or of a sale by an individual only. In no book of practice can I find any authority for saying that a sale of property by a receiver is, in any sense, a sale by the Court; and nowhere do I find that a sale by a receiver has been treated as a sale by the Court. But it is true that, in some cases, sales by a receiver have been confirmed by this Court, preparatory to possession being ordered to be delivered to the purchaser, — the receiver not being at liberty to give possession without an order. An instance of this occurred on the 21st of December last, when an order was made in the suit of *Monmothonath Dey* v. *Ashutosh Dey*, confirming a sale by the receiver and ordering the purchaser to be put in possession. A consideration of the course adopted in the present instance and in other cases in which the sale is made, not by the Court, but by third parties by the permission of the Court, leads me to conclude that the two classes of sales stand on quite different footings. When a sale is by the Court, the ordinary decree is simply that the property be sold with

approbation of the Court. The order made in this case is an order, by consent of all parties, that the receiver be at liberty to sell, and do sell, 'for the best price he can get for the same by public sale, with the privity, consent, and concurrence of the solicitors of the plaintiff and of the defendants,'—the power given to the receiver being independent of any further interference by the Court, save that the conveyance is to be settled by a Judge if the parties differ. When the sale is by the Court, the Registrar, following the practice of the Master, inquires into the title with a view to preparing the conditions of the sale. And after the sale, a purchaser who has not accepted the title is entitled to have an inquiry as to the title, and the Court will not knowingly pass off an absolutely bad title by means of special conditions. The receiver being empowered to sell with the consent of the parties, is under no restrictions whatever in this respect. In saying this, I do not mean to say that sales by the Court do not often, under special circumstances, take place under conditions similar to those under which the sale, which is the subject of this application, was made. When the receiver sells under such an order, he joins in the conveyance; being receiver in possession it is practically necessary he should do so; and the conditions of sale in this instance show that the receiver intended to join. When, however, the sale is by the Court, the parties alone convey, and the officer of the Court does not join. Finally, when the sale is by the Court, if the purchaser fails to complete, and the interference of the Court becomes necessary, one of the parties to the suit is the proper person to apply (and is the person who in practice does always apply) to the Court, and put the Court in motion. The Registrar or officer conducting the sale on behalf of the Court never applies. Here the receiver

applies himself, showing thus that he does not consider that his position is the same as that of the Registrar conducting a sale held by order of Court. The fact that Mr. Hogg is the Court receiver does not, as it seems to me, place him in a different position from that which any other person appointed receiver in the suit would have filled. The application must be dismissed with costs, as being one which ought not to have been made in this form.[1]"

Wilkinson v. *Gangadhur Sircar.*

In a subsequent suit Phear, J., referring to this decision said: "Mr. Justice Macpherson dismissed the application with costs, as I think very properly. But in the course of the judgment which he delivered on that occasion, he made some observations, which are not altogether consistent with the view of the receiver's functions which I entertain. He thought that, when the receiver sells under an order of Court, inasmuch as he is in possession of the property, it is practically necessary that he should join in the conveyance. I must say I have a very strong opinion that this is not so. It is not necessary that anyone should join in a conveyance of property, simply because he is in possession of it, though it is always necessary that he should be joined when he has any interest in it, which would be the case of course if he has any possession by right of lien; and I think it probable that it was possession of this sort which was present to Mr. Justice Macpherson's mind when he delivered that judgment.

"But the receiver's possession, as I have already said, is not possession by any personal right. It is the possession of the Court, and he is totally devoid of any interest in the property. It appears to me that the order of the

[1] *Chandranath Biswas* v. *Biswanath Biswas and others*, 6 B. L. R., 492 (1870).

Court that the property should be sold by the receiver does not impose any liability or responsibility on the receiver, which is not borne by the officer of the Court, who usually carries out orders for sale in the absence of any express nomination of the person who should do so. I apprehend that the order of the Court that the property in suit should be sold is merely operative on the parties to the suit. It binds them, willing or unwilling, to the sale of the property which will be made under the order. Some one must, of course, act as the agent; and when any of the owners abstain from taking part in it, or are under any disqualification, the person must be some one appointed by the Court. The order that the receiver do sell specifies that the receiver is to sell instead of the ordinary officer of the Court."[1]

Minatoonessa Bibee v. *Khatoonessa Bibee.*

In, however, the recent case already cited[2] in which the purchaser obtained a rule calling upon the parties to show cause why he as purchaser at the receiver's sale should not be put into possession, the Court (Sale, J.) said: "The only point remaining to be determined is as to whether in the circumstances I ought to make an order for possession to be given to the purchaser. The question depends on whether a purchaser from a receiver is entitled to be put in the same position as a purchaser at a sale by the Registrar, or at an execution sale under the provisions of the Civil Procedure Code. A sale by the Registrar is made under an order of the Court, and is binding on all parties to the suit. So is a sale by a receiver. In what particular, then, does it differ from a sale by the Registrar? In the case of *Chandra Nath Biswas* v. *Biswa Nath Biswas*[3] it appears that an

[1] *Wilkinson* v. *Gangadhur Sirkar*, 6 B. L. R,, 493, 494 (1871).

[2] *Minatoonessa Bibee* v. *Khatoonessa Bibee*, I. L. R., 21 Cal., 479 (1894).

[3] 6 B. L. R., 492.

application was made by a receiver to compel a defaulting purchaser to come in and complete his purchase. The learned Judge (Macpherson, J.) held that the application was irregular in form and dismissed it, but in the course of his judgment he made observations which seem to show that he considered that a sale by a receiver stood on a different footing from a sale by the Registrar. If that were so, and if a sale by a receiver under an order of Court differs in no respect from a private sale, a purchaser at a receiver's sale can only obtain possession adversely by a suit for possession against any person withholding possession, even though such person should be a party to the suit and bound by the order for sale, and by it concluded and estopped from making any defence. But there are cases in this Court in which sales by a receiver have been regarded as sales by the Court, and orders for possession have been obtained by the purchasers under the Code. In one instance where property was attached in the hands of a receiver, the Court ordered the property to be sold by the receiver instead of by the Sheriff, and the subsequent proceedings were precisely similar to those which take place in an execution sale by the Sheriff.[1] In another case, a mortgage suit, the receiver, instead of the Registrar, was ordered to sell the property comprised in the mortgage, *viz.*, a family dwelling house in the occupation of the defendant, who was the widow and executrix of the deceased proprietor. After the sale, an order was obtained by the purchaser on notice, that a conveyance be executed by the Registrar for and in the name of the defendant, and that the Sheriff do in the manner provided for by section 318 of the Code deliver

[1] *Pertab Chunder Johurry* v. *Bhoobun Mohun Neogy*, Suit No. 144 of 1884, Order dated 30th July 1883.

over possession to the purchaser.[1] A similar order was made in an administration suit in which the receiver appointed in the suit, instead of the Registrar, was directed to sell. In that case, on the application of the purchaser, an order was made confirming the sale and directing possession to be given to the purchaser. This was followed by an order directing the Sheriff to put the purchaser in possession.[2] In another case, an administration suit, in which property was sold by the receiver under a decree of Court, an order was made, under the provisions of the Code, for the execution of the conveyance by the parties to the suit, or, if they should fail to comply with the order, by the Registrar for them and in their names :[3] In Suit No. 118 of 1884, *Roy Chund Datt* v. *Shamlall Soor*, a sale by a receiver was treated as a sale by the Court, and a certificate of sale was granted by an order, dated 6th May 1885. These are unreported cases, a note of which has been furnished by the Registrar.

They show that sales by receivers under the directions of the Court have been treated as sales by the Court. And when sales by receivers are in all essential particulars similar to sales by the Registrar, I confess I can see no reason why they should not be treated as sales by the Court. They have not, it is true, been provided for by the rules of the Court. Being of an exceptional character, it was probably not thought necessary to provide for them by any special rules. But if they are sales by a Civil Court in a suit, the procedure prescribed by the Code for sales in a suit would be applicable. It should

[1] *Herumbo Chunder Haldar* v. *Mohaluckhy Dossee*, Suit No. 100 of 1833, Order dated 8th December 1888.

[2] Suit No. 27 in 1886, Orders of 29th August 1889 and 22nd November 1889.

[3] *Broughton* v. *Ashraffooddeen Ahmed*, Suit No. 694 of 1879, Order dated 12th September 1893.

be observed that the procedure prescribed by the Code is applicable not only to a suit, but also to miscellaneous proceedings, the intention being that it should be as widely applicable as possible, see section 647 of the Code. An important fact in the present case is that this particular sale has been already treated as a sale by the Court, the Registrar having been directed, under the provisions of the Code, to execute the conveyance on behalf of some of the parties to the suit. The practice followed in these cases shows that this Court has recognised the right of a purchaser at a receiver's sale to invoke the assistance of the Court in obtaining possession under the provisions of the Code. On the materials before me, it sufficiently appears that possession has not been obtained by the purchaser of all the properties purchased by him. I must, therefore, make an order for possession in his favour. This order will supersede the previous order for possession made in favour of the receiver."[1]

In the undermentioned suit[2] the defendant mortgaged certain properties, which he took under the Will of his father, to the plaintiff. Plaintiff brought this suit on the mortgage and obtained a decree and an order for sale by the Registrar. In the meantime a suit for administration of the testator's property had been filed and an order made in that suit appointing a receiver. Plaintiff then applied that the sale of the mortgage properties might be held by the receiver appointed in the administration suit instead of by the Registrar. The administration suit was still pending and administration of the testator's estate had not been completed. *Held*, that the sale could not

[1] *Minatoonnessa Bibee* v. *Khatoonnessa Bibee*, I. L.R., 21 Cal., pp. 481, 482 & 483 (1894).

[2] *Netai Chand Chuckerbutty* v. *Ashutosh Chuckerbutty*, 5 C. W. N., p. 408 (1901).

be held by the receiver before the completion of the administration ; and that till such completion of administration it could not be said that the defendant was entitled to the mortgaged properties.

Liens upon property held by a receiver are not divested by virtue of a sale made by him. If the order of sale makes no mention of prior encumbrances the sale passes the title to the property as it is in the receiver and subject to whatever encumbrances there may be existing upon it. A purchaser at a receiver's sale may therefore question either the validity of the encumbrances or of the amount due thereunder. Such purchaser is presumed to know that the receiver can sell only such interest in the property as is possessed by the parties to the action in which he is appointed. He must ascertain for himself what that interest is, and he takes the property subject to the liens upon it.[1] Ordinarily a receiver will not be given leave to bid at a sale by the Court of the property subject to the receivership and cannot, it would seem without the special leave of the Court, purchase either directly or indirectly in the name of a trustee for himself any property or interest in any property over which he is receiver.[2] Whenever any estate or share of an estate situate outside Calcutta has been sold by the Official Receiver, such sale shall be notified by him to the Collector of the District in which such estate or share of an estate is situated.[3]

(*h*) Borrowing.

If a receiver requires money to enable him to discharge his duties the Court will give him leave to borrow

[1] *See* Beach, Receivers, §§ 732-735.

[2] Kerr, 207, citing 1 Fl. & K., 196; but see *id.*, and Belchambers' Rules and Orders, p. 220, citing *Gunnesser Lal* v. *Khoob Narain*, Sept. 3, 1886, where a receiver obtained leave to bid. See *Addenda*.

[3] Belchambers' Rules and Orders, 21A.

upon the security of the property in his hands.[1] In considering in the case of receivers the question whether a power to raise money on the property itself may be necessary for its own preservation regard must be had to the conditions under which estates are held in this country, one of which is that they are liable to be sold if the rents and revenue due upon them are not paid; and when that fact is appreciated, it is apparent that the power to take the estate out of the hands of the owners and to place it in the hands of a receiver with power to do what is necessary for its protection must include a power to raise money to pay rent or revenue when it is necessary to do so; as to hold otherwise would be to hold that a receiver appointed to protect the estate could not interfere to prevent its being lost to the parties interested, although his appointment put it out of their power to protect it themselves.[2] Where it is necessary for the preservation of the estate it has always been taken to be law that the Court may authorise the receiver to charge the property. The Court, if it can appoint a receiver, has ample powers to provide for the management of the property; and if the property is in danger of being lost, the Court has power to prevent such loss by raising money on it The Court can deal with property which is under its control just as completely as the owner of the property can deal with it. How far the Court ought to allow a sale or pledge of course depends upon the circumstances of each case.[3] In a suit for partition the Court has jurisdiction to place the whole of a joint estate out of which a plaintiff seeks to have his share

[1] Kerr, 194, 195; see *Greenwood v. Algesiras Railway Co.* (1894), 2 Ch., 205.

[2] *Poreshnath Mookerjee* v. *Omerto Nauth Mitter*, I. L. R., 17 Cal., 614, 619 (1890).

[3] *Ib.*, 615.

partitioned in the hands of a receiver and to order that a receiver so appointed shall be at liberty to raise money on the security of the whole of such joint estate.[1] Liberty will be given of course to borrow not merely to avoid the loss abovementioned, but whenever it may become necessary for the proper management of the estate.[2]

(i) *Payment.*

When the ascertainment of an estate has been placed by the decree in the hands of a Commissioner it is inconvenient and irregular to ask a Judge to decide that there is a particular charge upon it, or debt due in respect of it. In many cases it might cause injustice to others for a Judge to make such an order. If the decree does not contain a direction to the Commissioner to ascertain what are the charges on the property and the debts due in respect of it, the proper course is to obtain a suppiementary direction to that effect. Where therefore a receiver had been appointed, but no power had been reserved to him to pay debts due by the estate, an application, therefore, by a plaintiff that a receiver should satisfy out of the moneys in his hands to the credit of the suit, the claims of two creditors was refused.[3] Upon such refusal, however, the plaintiff *ore tenus* asked for an order that the above claims should be paid out of the plaintiff's share leaving the question whether they ought to be paid out of the whole estate to be determined in the office of the Commissioner when the proper time for ascertaining that fact arrived. Upon such application the Court (Farran, J.) said :—

"I have, I think, undoubted jurisdiction to make an order for payment of these sums out of the plaintiff's

Motivahu v. *Premvahu.*

[1] *Poreshnath Mookerjee* v. *Omerto Nauth Mitter*, I. L. R., 17 Cal., 614.

[2] See *Mohari Bibee* v. *Shama Bibee*, 7 C. W. N., cclxviii (1903)

[3] *Motivahu* v. *Premvahu*, I. L. R., 16 Bom., 511 (1892).

share. From early times it was the practice of the Court of Chancery in England to make such orders, but the Court seems to have exercised the power very sparingly, and only in very special cases, and under special conditions. The authorities are collected in Daniell's Chancery Practice (6th Ed.), p. 988, note (*o*). The Statute 15 and 16 Vic., c. 86, section 57, widened and extended this power of the Court by enacting that whenever any real or personal property forms the subject of any proceedings in Chancery, and the Judge is satisfied that the same is more than sufficient to answer all the claims thereon which ought to be provided for in such proceedings, the Judge may, at any time after the commencement of such proceedings, allow to the parties interested therein, or to any one or more of them, the whole or part of the annual income of the real estate, or part of such personal property, or a part, or the whole, of the income thereof. A corresponding Act was passed for the Supreme Courts in India, Act VI of 1854, section 35 of which gave these Courts similar powers. That Act has been repealed by Act VIII of 1868, but the repeal (section 1) does not affect any practice or procedure directed by it.

"My jurisdiction, therefore, to make the order is clear. The order is not, as a rule, made, unless there is some pressing reason for it, and the Court can see that the parties are clearly entitled. In this case the title of the plaintiff to half the property is established by the decree. The property is considerable. It consists of a house in Bazar Gate Street, which was purchased for Rs. 35,000, and there are about Rs. 10,000 in the hands of the receiver. It is not suggested that there are any charges on this property, or debts due in respect of it, save the debts, the subject of this motion. Assur Lalji has obtained a decree against the plaintiff for about

Rs. 3,000 and costs, which he threatens to enforce by attachment. There is strong reason for believing that the debt is payable out of the joint-property. There is also a small claim for about Rs. 440, due to Mowji Issur, which is in nearly the same position, though no decree has been obtained in respect of it. These claims bear interest, while the plaintiff's monies in the hands of the receiver bear none. The decree in this suit was, as I have said, made in February 1891, but the directions contained in it have not been proceeded with, because the defendants are quarrelling as to who is to take out probate to the will of Pragji, and till that is done, the suit is at a standstill. It is difficult to conceive a greater case of hardship on the plaintiff. The order asked for by her should, therefore, if possible, be made." The Court then made an order in the following terms :—" That the receiver do pay, out of the funds in his hands, the claims of Assur Lalji and Mowji Issur, but such payments are not to extend beyond a half share of such funds ; and let such payments be debited against the plaintiff's share in the property, the subject-matter of the suit, without prejudice to the plaintiff's contending and proving to the Commissioner or the Court, when the directions contained in the decree are being carried out, that such claims were claims charged upon, or payable out of the joint-estate." [1]

In the case last cited it was also held that where the notice of motion asks for an order in particular terms and the applicant upon such order being refused asks *ore tenus* for an order in different terms which was not asked for by the notice of motion had in connection with the affidavits filed in support thereof, the Court will only make such order if the opposing party is not taken by surprise and

[1] *Motivahu* v. *Premvahu*, I. L.R., 16 Bom., 511 (1892).

does not consider that he can adduce further facts or arguments. If such be the case leave will be given to the applicant to amend his notice of motion and the hearing will be adjourned.[1]

As regards payment of money or delivery of property to the receiver under an order, the latter usually provides that the receipt or receipts of the receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid or delivered to him as such receiver.

An order may be made requiring the receiver to advance a sum of money to one of the parties to the suit for his defence. Ordinarily when money is so advanced provision is ultimately made for it in the decree. If the plaintiff succeeds in a suit, the money which he has been required to advance for the defence conducted on behalf of a minor defendant is recoverable as part of the costs of the plaintiff.[2]

An order directing a receiver in a suit to advance money to a guardian *ad litem* to enable him to conduct the defence on behalf of a defendant is not a judgment within the meaning of Article 15 of the Letters Patent and no appeal lies therefrom.[3]

If a receiver has power to pay debts he may pay an instalment of a debt even though the effect of his so doing may be to stop limitation from running.[4] But a

[1] *Motivahu* v. *Premvahu*, I. L. R., 16 Bom., 511 (1892).

[2] *Kuppusami Chetti* v. *Rathnavelu Chetti*, I. L. R., 24 Mad., 511 (1901). In the Goods of *Gopal Lal Seal*, Suit No. 11 of 1902, Cal. H. C., the Court (Ameer Ali, J.), made an order that the administrator *pendente lite* should pay a certain amount to be fixed by the Registrar to each of the widows of the deceased claiming as his heiresses in case of intestacy for their costs of suit in contesting an alleged will propounded by the executor thereunder who contested such payment. Order 9, March 1903.

[3] *Kuppusami Chetti* v. *Rathnavelu Chetti*, I. L. R., 24 Mad., 511 (1901).

[4] *Re Hale, Lilley* v. *Ford* (1899), 2 Ch., 107.

payment made by a receiver which is not authorised by the order appointing him will not stop the Statute from running.[1] A receiver appointed on behalf of a mortgagee is the "agent" of the mortgagor within, 3 and 4 Wm. 4, c. 27, section 40, and a payment of interest by him stops the Statute.[2]

The question whether an application to enforce execution of a decree was barred by limitation depended upon whether a payment out of Court to plaintiffs of money collected by a receiver constituted (with the application alleged to have preceded it) a step in aid of execution within the meaning of Article 179 of Schedule II to the Limitation Act. The receiver had been appointed during the pendency of the suit, which was by mortgagees for possession of the mortgaged land and for mesne profits accrued prior to the date of plaint. The receiver remained in possession of the land for a period of six months after decree, when he handed it over to the plaintiffs; and the payment out of Court above referred to was of money which had apparently been collected by the receiver during the said six months, and formed no part of the mesne profits dealt with by the decree. *Held* that such money was not collected or paid in execution of the decree, though the plaintiffs had become entitled to it as a consequence of the decree. It consisted of current profits of the estate, in demanding which plaintiffs had done nothing towards the execution of the decree which did not deal with such profits, and which could be fully executed without reference to them. And *held* therefore that the payment referred to did not constitute a step in aid of execution, and that the application was barred by Article

[1] *Whitley* v. *Lowe*, 25 Beav., 421; 2 D. & J., 704.

[2] *Chinnery* v. *Evans*, 11 H. L. C., 115; Kerr, 192: v. *ante*, p. 88, as to limitation.

179 of Schedule II of the Limitation Act.[1] A receiver, it has been held, is a trustee for the parties interested of any money due from him as receiver and not accounted for by him and cannot, as against such parties, avail himself of the Statute of Limitations although his final accounts have been passed and the recognizances vacated.[2]

(i) Suits by or defended by receiver.

With regard to suits by a receiver two questions require consideration, namely, as to his right to sue in general and as to the name in which he should sue. One of the most important functions exercised by receivers in the discharge of their official duties is that of bringing such actions as may be necessary to the proper discharge of their trust as well as to secure and protect the assets and funds to whose control they are entitled by virtue of their appointment.[3] As a general rule all rights of action which belong to the party whose property is put into the hands of a receiver are transferred to the latter by virtue of his appointment.[4] The appointment does not affect existing contracts or rights of action between the party whose property is placed in the hands of the receiver and others: he has no greater rights or advantages than those possessed by his principal.[5] A receiver, therefore, cannot maintain an action upon a note or obligation running to the original party which he himself could not have maintained.[6] His right of action relates back to the beginning of the title in the party for whose property he is receiver: if substituted in place of the owners of the property he acquires all their rights by subrogation.[7] Inasmuch as for the purpose of actions and suits connected

[1] *Appasami Naickan* v. *Jotha Naickan*, I. L. R., 22 Mad., 448 (1899).

[2] *Seagram* v. *Tuck*, 18 Ch. D., 296.

[3] High, § 200, *et seq.*

[4] Beach, § 663.

[5] *Ib.*, § 664; High, § 204.

[6] *Williams* v. *Babcock*, 25 Barb., 109 (Amer.); *Bell* v. *Shibley*, 33 Barb., 610 (Amer.)

[7] Beach, § 667.

with their receivership, receivers occupy substantially the same relation which was occupied by the original parties against whom or over whose estate they were appointed, any defence which a defendant might have made to an action brought by the original party in interest is equally available and may be made with like effect when the action is instituted by the receiver.[1] The fact that a person is an officer of the Court entitles him to no privileges not accorded to other suitors, and in seeking relief he must commence his actions by the same process that other suitors are required to employ.[2] A receiver's liability for costs in actions instituted by him on behalf of the estate is similar to that of any other trustee—as, *e.g.*, an executor or administrator—who sues for the interest of an estate, but being an officer of the Court, he usually receives special consideration.[3] Should he fail in his action he will of course be directed to pay the costs of the defendant, but as between himself and the estate he represents he will, if he has acted properly with care and in good faith, be allowed his costs out of any funds which are in, or may come to, his hands.[4] Such an order in favour of a receiver will, however, generally only be made in the suit in which he has been appointed and not in the suit brought by him, unless in such latter suit the estate which he represents is fully before the Court. So in a suit to have it declared that a lease which was executed by a receiver in favour of the plaintiff was a valid and subsisting lease, the Court held in favour of the plaintiff and granted the latter his costs as against the receiver, and with regard to the costs of the receiver

[1] High, § 205; Beach, §§ 699—706.

[2] Beach, § 665; [Verification of plaint by receiver's muktear is probably sufficient. *Drobomoyi Gupta* v. *Davis*, I. L. R., 14 Cal., 339 (1887).]

[3] *Ib.*, § 679.

[4] See *ib.*, Seton, 4th Ed., 442; 5 Simon, 620; 2 Phillips.

observed as follows :—"But having regard to the way the dispute arose between the parties and the way in which it was conducted, I can see nothing wrong or improper in the defendant in exercising what he thought to be his rights, and I am of opinion that he considered that he was acting in the best interests of the estate. If the latter were before me, I would say he was rightly entitled to be recouped out of the estate. But as the estate is not before me, I cannot make the order which I should otherwise have made. But doubtless this expression of my opinion will be sufficient now. The plaintiff must of course have his costs of suit on scale No. 2. Any application which the receiver may hereafter make as to the payment of his costs I shall be glad to consider." [1]

Since, however, a receiver sues in a representative capacity and not in his personal right, it is necessary that he should not only set out in his pleading the right of the party whom he represents, but also the authority under which he assumes to act ; and generally it is essential that he do this by showing in a way capable of being traversed his appointment by a Court of competent jurisdiction in a case within its jurisdiction and that he has its authority to prosecute the action. Courts are inclined to the exercise of a strict control over their receivers in the matter of allowing them to bring suits concerning their receivership, and an action brought by a receiver is considered as brought under the order of the Court itself. Under the usual form of High Court order a receiver must not without the leave of the Court bring suits in a District Judge's or Subordinate Judge's Court except

[1] *E. J. King* v. *Charu Chandra Mittra*, Receiver to the estate of *Punna Lall Seal, deceased*, Suit 635 of 1897, Cal. High Court, *cor.* Sale, J., 3 Sept. 1897 ; costs were also given against the receiver in *Drobomoyi Gupta* v. *Davis*, I. L. R., 14 Cal., 347 (1887).

suits for rent or institute an appeal in any Court (except from a decree in a rent suit) when the value of the appeal is over 1,000 rupees. A receiver will not be permitted to abuse the power intrusted to him by unauthorized suits against third persons. If, therefore, a suit is instituted without authority, the parties are entitled to the protection of the Court against such unauthorized proceedings on the part of the receiver who will be directed to discontinue the action.[1] The undermentioned suit[2] was one by the plaintiff as receiver appointed under an order of Court with authority to sue defendant for money due to a third party. The money was due under an agreement dated 26th August, but by mistake the order referred to the money as being due under an agreement of the 25th October. Plaintiff thereupon applied to amend the order and the plaint. *Held* plaintiff's authority to bring this suit being dependent on this order no amendment could be made so as to affect this suit. The amendment would only operate as a new order of attachment and a new order for appointment of receiver, and such orders could only operate from the date on which they were made and could not therefore be the basis or authority for the present suit. The usual practice both in England and America[3] and in this country before instituting actions by a receiver in matters connected with his trust is to apply to the Court, from which he derives his appointment, for leave to bring

[1] Beach, § 693; High, §§ 201, 202; as to the necessity for leave, *see* Kerr, 163-171. In *Dinnonauth Sreemonee* v. *C. S. Hogg*, 2 Hay, 395, 399 (1863), it was said that in the absence of evidence the Court will assume that the receiver's suit was instituted by order of the Court, *Sed qu*, it being upon the receiver as plaintiff to establish both his case and authority to sue. As to cases where having an independent cause of action the fact that a person is receiver does not disqualify him from suing and in which cases he does not sue in his character of receiver, *see* Kerr, 164.

[2] *Benode Bihary Mookerjee* v. *Roj Narain Mittra*, 7 C. W. N., 651 (1903); S. C., I. L. R., 30 Cal., 699.

[3] High, § 183.

such actions. And although it is frequently the case that the order of appointment in general terms authorizes the receiver to sue for and collect all demands due, yet it is a common and safe practice to first obtain special leave of Court before beginning an action. A receiver does not represent the owner of the estate for which he is receiver, but is merely an officer of the Court and as such cannot sue or be sued except with the permission of the Court.[1] If the receiver wants possession he should put the Court in motion.[2]

An order of appointment of a receiver drawn upon the form prescribed in form 168 of the fourth schedule to the Civil Procedure Code gives a receiver full powers under the provisions of section 503. Where, however, the order is not drawn up in that form, instead of having full powers under section 503, the receiver has the limited powers expressly given by the order of appointment.[3] Where, therefore, *D* was appointed receiver in a partition suit pending in the High Court by an order which, amongst other things, gave him power to let and set the immoveable property, or any part thereof as he should think fit and to take and use all such lawful and equitable means and remedies for recovering, realizing and obtaining *payment* of the rents, issues and profits of the said immoveable property and of the outstanding *debts* and *claims* by action, suit or otherwise as should be expedient, and *D*

[1] *A. B. Miller* v. *Ram Ranjan Chakravarti*, I. L. R., 10 Cal., 1014 (1884). In the subsequent case, *Hari Dass Kundu* v. *Macgregor*, I. L. R., 18 Cal., 477, 481 (1891), the Court stating that it had been referred to the former case, said that it did not altogether agree with the general terms of that decision. In what respect the Court disagreed is not stated, but it is a well nigh universal rule in all Courts that a receiver may not bring any suit without having first obtained leave of the Court; Beach, § 650.

[2] *Ram Lochun Sircar* v. *Hogg*, 10 W. R., 430, 431 (1868).

[3] *Drobomoyi Gupta* v. *Davis*, I. L. R., 14 Cal. 323, 340, 341 (1887).

without special leave of the Court served a notice to quit on certain tenants of the estate, who claimed to hold a *permanent* lease, and afterwards instituted a suit to eject them also without special leave of the Court, it was held that the order appointing him did not give him power to serve such notice or to institute such suit without the special leave of the Court, and that as a receiver is not otherwise authorised to institute such suits without special leave of the Court the suit must be dismissed.[1] In however, a subsequent case[2] it was pointed out that the former was a suit for the determination of a tenancy of a *permanent* character, and it was held that a receiver appointed under an order in similar terms to the foregoing had power under that order to sue, to eject without obtaining special permission a *monthly* tenant whose tenancy was determinable by a notice to quit which had been duly served.[3]

In order to avoid the necessity of frequent applications to the Court for liberty to sue it has become customary to give to the receiver in the order by which he is appointed general leave, but as the authority to sue conferred by the order of appointment is confined to such suits as are contemplated by the order,[4] and as doubt may arise whether the particular suit brought is within the terms of the authority it is customary, as above stated, to obtain special leave in each case. Proof of the appointment of the receiver and of leave to sue is generally given by the production of a certified copy of the respective orders. It seems to be established that the regularity, propriety or necessity of the appointment of a receiver is not to be questioned in a merely collateral action at least by parties or privies to

[1] *Drobomoyi Gupta* v. *Davis*, I. L. R., 14 Cal., 323, 340, 341 (1887).

[2] *Huri Doss Kundu* v. *Macgregor*, I. L. R., 18 Cal., 477 (1891).

[3] *Ib.*

[4] Beach, §§ 650, 651.

the action in which the appointment was made. As to the rights of other parties in this respect there seems to be a difference of opinion. Probably, however, those who were entire strangers to the original proceeding should be allowed in a collateral action where their interests are affected by the appointment to attack the order on the ground that it was procured through fraud, collusion or deception practised on the Court, but for no other reason.[1] The rule in the Original Side of the Court taken from the practice of the English Court of Chancery is not to compel a party to a suit to give up to the receiver possession of property unless an order of Court to that effect had previously been made upon him.[2]

The general doctrine recognising a receiver as the officer of the Court is not to be understood as limiting or restricting his rights in the management of a suit which he has once undertaken, and after entering upon a litigation he is regarded as being entitled to all the freedom of action of any other suitor, and the fact that he appeals from a decision which is against him is not of itself evidence of bad faith or of mismanagement of his trust and may be a meritorious rather than a censurable act.[3]

Some conflict of authority exists whether, in the absence of special authority, a receiver may sue in his own name or in the name of the original party in whose favour the action accrued. In the first case a distinction must be drawn between the cases where, though the party suing may be a receiver, he has an independent cause of action entitling him to sue and to sue in his own name and in which cases he does not really sue in his character of receiver. So a receiver who is holder of a bill of ex-

[1] Beach, §§ 698, 702.

[2] *Ram Lochun Sircar* v. *Hogg*, 10 W. R., 430 (1888).

[3] High, § 207; and *see* as to appeals by a Receiver; Beach, § 716.

change may by the law merchant sue in his own name ;[1] also when as bailee he has a special property in the goods ;[2] or if he is possessed of chattels and those chattels are unlawfully detained from him. So too after a tenant has attorned to the receiver and so created a tenancy between him and the receiver, the latter may destrain upon the tenant in his own name and on his own authority without leave obtained from the Court ;[3] and there may be other cases in which, having an independent cause of action, the fact that he is receiver does not disqualify him from suing.[4] In other cases, however, and where the receiver is suing in respect of a cause of action which has accrued to him in his representative capacity from the party whose estate he holds, the prevalent rule appears to be that where the matter is not controlled by statute or order of Court the receiver should sue not in his own name but in that of the parties whose estate he holds.[5] But this view is stated[6]

[1] *Ex parte Harris*, 2 Ch. D., 423. Kerr, 185.

[2] *Hills* v. *Reeves*, 31 W. R. (Eng.), 209.

[3] Kerr, 181, *et ibi casas : Wilkinson* v. *Gungadhar Sirkar*, 6 B. L. R., 491 (1871).

[4] In re *Sacker*, 22 Q. B. D., 185 ; in *Wilkinson* v. *Gungadhar Sirkar*, supra, at p. 491, it was said : "It may happen that matters arise out of the receiver's possession which are such as to render it necessary for him to sue personally in regard to them, *i.e.*, such as it would be wrong for any of the parties themselves to sue, *e.g.*, where tenants have attorned to him or he has let property in his own name." This was a suit for specific performance of a contract of sale executed by the receiver in his own name and the receiver was admitted as co-plaintiff.

[5] Beach, § 688 ; High, § 209 ; *Wilkinson* v. *Gungadhar Sirkar*, 6 B. L. R., 486 (1871) : "Now the application that the receiver should have leave to sue simply means this, that he should use the names of the owners of the property and come into Court on their behalf whether they consent to his doing so or not :" *ib.* at p. 490 ; *Ram Lochun Sircar* v. *Hogg*, 10 W. R., 430 (1868). Suit in receiver's own name held to be an error of form only, remediable in appeal, where no objection had been taken. *Juggannath Pershad Dutt* v. *Hogg*, 12 W. R., 117 (1869).

[6] Beach, §§ 683, 689 ; High, §§ 209, 210.

to be losing ground and has not always been adhered to either in America [1] or England,[2] and it has been held in the former country that a receiver by virtue of his appointment is a quasi-assignee invested with title to such an extent at least as will enable him to sue in his official character.[3]

Where the order appointing the receiver gives him power to sue in his own name or in the names of the parties to the suit, it might well be held that such an order merely entitles the receiver to sue in his own name in cases in which such action is proper and in all other cases to use the names of the parties. It has, however, been decided that the Court has authority under section 503 to confer on a receiver the power to sue in his own name, and that if the order appointing the receiver gives him liberty he may do so in any case.[4] Where the receiver is permitted to sue in the names of the parties and does so, no action on their part is necessary.[5] A receiver of attached property may also sue. He does not represent the estate for all purposes. He would have none of the powers which may be conferred under section 503 in respect of property belonging to the judgment-debtor not attached in the suit in which the order was made.[6] In the last-mentioned case a zemindary was attached in execution of certain decrees

[1] Beach, §§ 688, 689; High, §§ 209, 210.

[2] Kerr, 169, *et ibi casas; see* also *Evelyn* v. *Lewis*, 3 Hare, 472; *Armstrong* v. *Armstrong*, L. R., 12 Eq., 614; *Paterson* v. *Gas Light & Coke Co.*, 2 Ch. (1896), 476.

[3] Beach, § 689.

[4] *W. R. Fink* v. *Maharaj Bahadur Singh*, I. L. R., 25 Cal., 642 (1898); S. C., 2 Cal., 469. "It is such a convenience to suitors for the receiver to sue in his own name. Some of the parties may be dead; and if the receiver is to use the name of the parties he would have to get the suit revived, but if he sues in his own name no such difficulties arise," *ib*; *per Cur.*, 615, it is often a great saving of time, trouble and expense, *ib.*, 646. In *Fink* v. *Buldeo Dass*, I. L. R., 26 Cal., 715, the receiver sued in his own name.

[5] *Drobomoyi Gupta* v. *Davis*, I. L. R., 14 Cal., 339 (1887).

[6] *Sundaram* v. *Sankara*, I. L. R., 9 Mad., 334, 337 (1886).

against the zemindar, and the plaintiff was appointed receiver with full powers under section 503 to manage the zemindary. Before the appointment of the receiver the zemindar had expended certain sums at the defendants' request to repair a tank for the irrigation of lands held by them in common with him. The suit was brought to recover the sums so expended. It was objected that the receiver could not maintain the suit on the ground that the sum sued for was neither the subject of a suit against the zemindar nor property attached in execution of a decree against him, but it was held that the receiver could maintain the suit.

The necessity for permission extends not merely to suits brought by but also to suits defended by the receiver. Whether a receiver shall be permitted to defend an action already pending against his principal is wholly discretionary with the Court.[1] It is not proper for a receiver to defend actions brought against him without the sanction of the Court, and if he does so and is unsuccessful he may be disallowed his costs of action. But if he defends an action brought against him successfully without putting the estate to the expense of an application to the Court which he might have made for his own benefit, he has the same right to be indemnified as if he had applied to the Court.[2] In a case where ejectment was brought against a receiver although without leave the Court decided an enquiry whether it would be for the benefit of the parties interested, who were adults, that the receiver should defend the ejectment and charge the expenses in his accounts.[3]

Persons interested in the estate of a testator, not being the legal personal representatives of the testator, will not be allowed to sue persons possessed of assets belonging to

[1] Beach, § 708. [2] Kerr, 192. [3] Anon., 6 Ves., 287.

the testator, unless it is satisfactorily made out that there exist assets which might be recovered, and which, but for such suit, would probably be lost to the estate. Such a suit may be supported where the relations between the legal personal representative and the debtor to the estate present a substantial impediment to the prosecution by the legal personal representative of a suit against the debtor to recover the assets of the testator, and where there is a strong probability of the loss of such assets unless such a suit be allowed. But where there is an administration suit already pending, the proper course to pursue is to obtain an order in the administration suit, directing either a suit to be brought in the name of the legal personal representative, or appointing a receiver to sue; and in this country the Courts might have the power to direct such receiver to sue in his own name.[1] A party to a cause does not by being appointed receiver thereby lose his privilege as a party to the cause and may apply to the Court, as if he did not hold the office.[2]

Applications in respect of estate.

The usual rule as regards applications in respect of the estate is that they should be made by the persons beneficially entitled and not by the receiver. The latter ought not to present a petition or originate any proceedings in the cause, but should, if application to the Court become necessary, apply to the party conducting the proceedings or probably to any other party in the suit at whose instance he may have been appointed to make the necessary application. If after he has done so no application be made and no proper means be taken to relieve the receiver from his difficulty he may apply himself, and will be entitled to his costs.[3] It is, however, to be observed

[1] *The Oriental Bank Corporation* v. *Gobind Lall Seal*, I. L. R., 10 Cal., 713.

[2] *Crisp* v. *Platel*, 2 Ph., 229.

[3] Kerr, 198, 199; *Wilkinson* v. *Gungadhar Sirkar*, 6 B. L. R., 487, 488 (1871); Beach, § 258.

that both in England[1] and in this country receivers have originated proceedings in their own name without any observation having been made as to the impropriety of such a course. In fact, according to the author's experience, the one course has been followed as frequently as the other in applications made to the Calcutta High Court.

(k) Indemnity.

A receiver is entitled to be indemnified out of his estate in respect of all costs, charges and expenses properly incurred by him in the discharge of his office or under the order of the Court. The compensation of a receiver is a charge upon the funds which may come into his hands.[2] Upon the question whether receivers are personally liable for debts incurred by them in the discharge of their duties, where they order goods for the purposes of the estate, the inference *primâ facie* is that they pledge their personal credit looking for indemnity to the estate assets, and this inference will not be rebutted by the fact that they sign orders as "receivers and managers."[3] They are entitled to this indemnity even in priority to the claims of persons who have advanced money under an order making the repayment of such advance a first charge on all the assets[4] and to the costs of the action.[5] When the Court gives a receiver authority to advance money for the benefit of the estate of which he is the receiver, it generally allows him interest at 5 per cent. on the sum which it authorises him to advance and gives him a charge on the assets for that sum and interest. If a receiver advances money without such previous authority he is only entitled to an indemnity out of the assets.[6] In a case where a receiver

[1] Kerr, 199.

[2] Beach, § 771; Kerr, 211.

[3] *Burt* v. *Bull* [1895], 1 Q. B., 276; *Ex parte Izard*, 23 Ch. D., 75, 79; and see *Re Brooke* [1894], 2 Ch., 600

[4] *Strapp* v. *Bull* [1895], 2 Ch., 1.

[5] *Batten* v. *Wedgwood Coal Co.*, 28 Ch. D., 317; and see *Morrison* v. *Morrison*, 7 D. M. & G., 215.

[6] *Ex parte Izard*, 23 Ch. D., 80.

has paid sums out of his own pocket in satisfaction of legacies he will be reimbursed.[1] A receiver may be entitled to allowances beyond his salary for any extraordinary trouble or expense he may have been put to in the performance of his duties or in bringing actions, or defending legal proceedings which have been brought against him, and is entitled to an indemnity in respect of such monies.[2] So where an adverse application had been made against a receiver by a party to the cause, which was refused with costs, the applicant being wholly unable to pay those costs, it was held that the receiver was entitled to be indemnified and have his costs as between attorney and client out of the fund in hand.[3] So also where a receiver defended an action and the defence was completely successful the extra expenses were allowed, although the receiver had acted without the leave of the Court.[4] When the Court has taken possession of an estate by a manager or consignee it will, as against all parties for whose benefit the possession has been held, refuse to permit its officers to be discharged until the amount due to them has been paid.[5]

(*l*) Salary and allowances.

The Court may grant to the receiver such fee or commission on the rents and profits of the property by way of remuneration as the Court thinks fit.[6] The receiver's allowance is either a percentage upon his receipts, or a gross sum by way of salary. In all cases in which it shall be referred to the Master to enquire and report who is a fit and proper person to be the receiver[7] of any estate

[1] *Palmer* v. *Wright*, 10 Beav., 236.

[2] Kerr, 213.

[3] *Courand* v. *Hanmer*, 9 Beav., 3, even though as in this case it belonged to incumbrancers.

[4] *Bristowe* v. *Needham*, 2 Ph., 190; and *see* generally Kerr, 213.

[5] *Moran* v. *Mittu Bibee*, I. L. R., 2 Cal., 69 (1876).

[6] Civ. Pr. Code, s. 503, cl. (*d*).

[7] No person shall be ineligible for the office of receiver merely because he is an officer of the High Court, Act XXVIII of 1866, s. 12.

and property the Master shall also enquire and report what will be a proper commission or salary to be allowed.[1] The amount which will be allowed is what is reasonable having regard to the difficulties or facilities of collection and management and the other circumstances of the estate. When a commission is allowed it is generally at the rate of 5 per cent, though the rate in the case of a very large estate has by arrangement with the receiver been fixed as low as one per cent. on the value of the estate coming into his hands provided that the remuneration was not less than a particular sum.[2]

A receiver may be appointed with his consent to act without salary. If a trustee or party interested ask leave to propose himself as receiver, he will be usually required to act without salary, unless by consent.[3]

A receiver is entitled to his costs, charges and expenses properly incurred in the discharge of his duties.[4] The question whether these include the assistance of a *Karkun* depends (if the terms of the order appointing him are silent upon the subject) upon the nature of the estate and must be determined in each case with reference to its own circumstances. No general rule can be laid down ; but whether he be allowed a *Karkun* or not, the receiver must himself perform the proper duties appertaining to his office. These he cannot delegate.[5]

[1] Rule 19. (Original Side).

[2] In the goods of *Luchminarain Bogla*, Cal.H.C.,26th March, 1901 ; it was further ordered that the receiver was at liberty to charge to the estate the cost of such personal establishment as he might consider necessary and that he be at liberty to appoint such person or persons as his agent or agents at Rangoon, Mandalay and Churu, as he might consider necessary and proper for the efficient management of the estate.

[3] Kerr, 215 ; but there is no inflexible rule as regards trustees. *Re Bignell* (1892), 1 Ch., 59.

[4] *Balaji Narayan Pavardhan* v. *Ramchandra Govind Kanade*, I. L. R., 19 Bom., 660, 662 (1894) ; or in extraordinary services which have been sanctioned by the Court. Kerr, 211.

[5] *Balaji* v. *Ramchandra*, supra.

A receiver may be entitled to allowances beyond his salary for any extraordinary trouble or expense he may have been put to in the performance of his duties. But if any extraordinary expenses have been incurred by the receiver, allowances for them will not be in general sanctioned unless they have been incurred with the approbation of the Court or unless the estate has been benefited thereby.[1] Even where the receiver has consented to act without a salary he will be entitled to be paid for services which have proved beneficial to the estate, and which it was no part of his duty as receiver and manager to perform, *e.g.*, working in the business as a mechanic.[2]

The payment of a receiver is not dependent on the sufficiency of the estate to bear all the costs. He is entitled to be paid without regard to the sufficiency of the estate to meet the claims upon it. The receiver is entitled to be paid next after the costs of realizing the estate. He is the officer of the Court, and the Court is bound to see that he is paid.[3]

(*m*) *Lien.*

A receiver has a lien on the estate for his claims and allowances.[4]

In *Bertrand* v. *Davies*[5] the Master of the Rolls summarized the results of the cases as to the receiver's or manager's lien thus :—

"The three following propositions may, I think, be decided from the above-mentioned cases.

"In the first place, that a lien on the estate exists for the costs of management where the management has been

[1] Kerr, 213-214.

[2] *Harris* v. *Sleep* (1837), 2 Ch., 80.

[3] *Batten* v. *Wedgwood Coal and Iron Co.*, 28 Ch. D., 317, 323, 324.

[4] *Prem Lall Mullick* v. *Sumbhoo Nath Roy*, I. L. R., 22 Cal., 930 (1895), Kerr, 256.

[5] 31 Beav., 429, 435, 436, cited in *Moran* v. *Mittu Bibee*, I. L. R., 2 Cal., 70 (1876); and *Prem Lall Mullick* v. *Sumbhoo Nath Roy*, supra.

conducted by a person authorized to do so by the owner of the property.

"In the second place, that though there be no express appointment of the manager, yet, if the person interested in the estate know that he is performing the duties and do not interfere, then they must be presumed to have acquiesced in his continuance in that office, and they cannot dispute his claim to a lien on the estate for the expenditure, which, by their tacit acquiescence, they have encouraged him to make.

"In the third place, where a receiver or manager is appointed by the Court, in a suit properly constituted such manager is to be considered as appointed on behalf of all persons interested in the property, and he is entitled to his ordinary commission and allowance, and also to a lien on the estate as against all persons interested in it for the balance, whatever it may be, that shall be found to be due to him on taking his accounts."[1]

The Court will not compel a receiver, who has been discharged, to make over the property in his possession until his lien has been satisfied or provided for by a sufficient indemnity.[2]

In the undermentioned case the attorneys for the plaintiff claimed a lien on the amount in the hands of the receiver of the Court to the credit of the plaintiff in a partition suit for the costs of the suit which had been secured by the deposit with the attorneys of the title-deed of the plaintiff's family dwelling house which formed a portion of the property sold by the receiver under the decree in the suit. *Held* in an application by the

[1] *See* also *Fraser* v. *Burgess*, 13 Moo. P. C., 314, 346; *Batten* v. *Wedgwood Coal and Iron Co.*, 28 Ch. D., 317, 324.

[2] *Prem Lall Mullick* v. *Sumbhoo Nath Roy*, I. L. R., 22 Cal, 960, 973 (1895).

attorneys for payment to them of such costs, that the lien could not be given effect to in summary proceedings of of this nature, but should form the subject of a regular suit. Except in such a suit it is not the practice of the Court to make any order for payment of costs between an attorney and his client.[1]

Duties and liabilities of receiver.

§ 29. A receiver duly appointed is strictly amenable for the proper discharge of the trust confided to him.[2]

(a) Amenability to Court.

A receiver is only amenable for his acts and accountable to the Court which appoints him.[3]

His amenability to the Court appointing him arises from his being its officer and consequently continues until he is finally discharged by the act of the Court. So it has been held that a compromise and dismissal of the suit does not discharge his accountability to the Court. Only the Court which appointed him can divest him of the trust which is imposed on him. Out of this rule as to the receiver's amenability to the Court which appointed him has grown the practice, to which reference has been already made,[4] of requiring all persons desiring to enforce claims against the receiver first to obtain the leave of the Court.[5]

(b) Duty of obedience.

A receiver's first duty is to obey the orders of the Court appointing him. If he does not, he may be deprived of his office by proceeding of contempt for disobedience. A receiver should follow the line of duty marked out by the decree or order, and if loss result from a departure therefrom, he will be required to bear it. The fact that the departure is made under the advice of counsel will relieve him from the imputation of *mala fides*, but not from liability.[6] Where the order appointing him is silent

[1] *Mahommed Zohuruddeen* v. *Mahomed Nooroodeen*, I. L. R., 21 Cal., 85 (1893).
[2] Beach, § 293.
[3] *Buddinath Paul Chowdry* v. *Bycauntnath Paul Chowdry*, 2 Tayl. & Bell, 192, 193.
[4] v. *ante*, pp. 85 *et seq.*
[5] Beach, § 293.
[6] *Ib.*, § 291.

upon a particular point or is not clear, it is both his right and duty to apply to the Court for necessary instructions.[1]

(c) No liability in respect of acts done under order.

A receiver is not liable for acts done under an order of Court. So it has been been held that no action can be maintained against a receiver for rents collected in pursuance of the order by which he was appointed notwithstanding the fact that the order was afterwards reversed on appeal. In the same way after a receiver has complied with an order to distribute the funds of an estate among the creditors who proved their claims he will be protected against the actions of other creditors for their claims or demands.[2]

(d) Impartiality.

A receiver should be entirely impartial. He is not appointed for the benefit merely of the party on whose application the appointment is made, but equally for the benefit of all persons who may establish rights in the case. He must not collude with any one or prefer one set of interests to another.[3] The receiver ought not to interfere in any litigation between the parties. If he does so, he will not be allowed the costs of a motion for such a purpose. It is the duty of a receiver to receive the rents and collect the monies without raising any controverted question between the parties.[4]

(e) Duties generally.

Many of the receiver's duties have been alluded to in dealing with his rights and powers. So his right to take possession implies also a duty to do so. And when he has done so, he should keep control over the property which he has reduced into possession. If he puts the property out of his control so that other persons are able to deal with it, he guarantees the solvency of these persons

[1] v. *ante*, p. 208.

[2] *Holcombe* v. *Johnson*, 27 Minn, 353 (Amer.): *Keene* v. *Gaehle*, 56 Ind., 343 (Amer.) cited in Beach, § 304.

[3] Beach, § 296.

[4] *Comyn* v. *Smith*, 1 Hog., 81; cited in Kerr, 198.

and becomes answerable for any loss which may ensue.[1] It is his duty to preserve and protect the property in his possession to the best of his ability.[2] A receiver however is not expected any more than a trustee or executor to take more care of the property entrusted to him than he would of his own.[3] So if he deposits the monies for safe custody with a banker in good credit to be placed to his account in the character of receiver he will not be answerable for the failure of the banker.[4]

(*f*) Liability or loss.

A receiver is however responsible for any loss occasioned to the estate from his wilful default or gross negligence.[5] So if he places the monies received by him in what he knows to be improper hands he will have to answer the loss out of his own pocket.[6] As regards mistake it was said by Lord Cottenham respecting a receiver: "If one even innocently pays money to other persons whom he supposes to be entitled in right of the parties in a cause, but who prove not to be so entitled, he will be responsible to such parties, inasmuch as in making such payments he departs from the strict line of his duty and is therefore liable for any error he may commit."[7] The receiver is responsible for all properties which came into his custody or management and he is responsible not only for actual monies received by him but for those which might have been received by him but for his wilful neglect or default.[8]

In a case where a receiver had paid monies to the plaintiff's solicitor, with directions to pay them into Court

[1] v. *ante*.

[2] Beach, 298.

[3] Kerr, 202.

[4] *Knight* v. *Lord Plymouth*, 3 Atk., 480, otherwise if he mixes the monies with his own. *Wren* v. *Kirton*, 11 Ves., 381; High, § 274.

[5] Civil Procedure Code, § 503, cl. (*h*); Kerr, 202.

[6] *Knight* v. *Lord Plymouth*, supra.

[7] *McCan* v. *O'Ferrall*, West, H. L., 593, 616, cited in Beach, § 302.

[8] *Coomar Sattya Sankar Ghosal* v. *Ranee Golapmonee Debee*, 5 C. W. N., 223, (1900).

which had not been done, the receiver was held liable for the loss, there being no sufficient evidence to show that the receiver had authority from the plaintiff to pay the monies to the solicitor.[1] And where a receiver who has been appointed by way of equitable execution pays the solicitor instead of the judgment-debtor, he is liable if the money never comes to the creditor's hands.[2] It being well settled that the receiver is the officer of the Court who holds possession of the property in controversy for the benefit of all parties interested and not for the plaintiff at whose instance he was appointed, it follows that the plaintiff should not be held responsible for losses which result from his wrongful acts or negligence, there being no participation therein or fraud on the part of the plaintiff. The responsibility for such losses rests upon the receiver and his sureties.[3] The immediate and direct responsibility of the receiver to the Court does not, however, relieve him from liabilities which he may incur towards third parties, and these liabilities are generally recognised and enforced by the same Court which has appointed him. And when a party to the cause who is interested in the funds in the receiver's hands, ascertains that the receiver has made improper payments or has misapplied the funds, or any portion of them, he may apply to the Court for relief at any stage of the cause, and it is not necessary that he should wait until the receiver passes his accounts and then have the improper payments disallowed.[4] The extent of a receiver's liability for the miscarriage or fault of another is dependent in a large degree upon whether the loss occurred through the receiver's own negligence or default. In cases of loss

[1] *Delfosse* v. *Crawshay*, 4 L. J., Ch. N. S., 32.

[2] *Ind Coope & Co.* v. *Kidd*, 63 L. J. Q. B., 726.

[3] Beach, § 303.

[4] *De Winton* v. *Mayor of Brecon*, 28 Beav., 200; High, § 269.

occurring by reason of his own negligence or misfeasance the receiver will be held liable. Where, however, he has acted with undue caution and for what he deemed the best interests of the estate and a loss occurs without fault of his own, he will not ordinarily be required to make good such loss.[1] So where a receiver collected a large sum of money due the estate and, deeming it unsafe to send the amount in specie, he purchased bills of exchange of a tradesman then in good credit, but who soon afterwards failed, the receiver having had no knowledge of his failing circumstances, it was held that he was not personally liable for the loss.[2] So also when a loss occurs through the fraud or misconduct of an attorney, as by his misappropriation of funds collected for the receiver, if the latter used due and reasonable care in selecting such attorney, he will not be charged with the loss.[3] A receiver may be ordered personally to pay costs incurred by reason of his misconduct or neglect in the discharge of his duties.[4] A person who having assumed to himself improperly the character, neglects the duties of a receiver whilst the parties interested consider him to be acting as receiver makes himself responsible for any of the property which is lost through his neglect.[5] The liability of a receiver to the Court appointing him does not terminate until his discharge.[6]

(*g*) Liability on covenants.

It has been held in America that if the receiver in the course of his duty enters into a covenant or executes an instrument by virtue of his office as receiver, he cannot be held personally liable upon it, and the remedy

[1] High, § 275.

[2] *Knight* v. *Lord Plymouth*, 3 Atk., 480, *supra*.

[3] *Powers* v. *Longbridge*, 38 N. J. Eq., 396 (Amer.), cited in High, § 275: Beach, § 318.

[4] Kerr, 206.

[5] *Wood* v. *Wood*, 4 Russ., 558; *Wickens* v. *Townsend*, 1 R. & M., 361.

[6] High, § 278.

upon such covenant must be sought against the estate of which he is receiver.[1]

(*h*) Information to be given to Court.

In all applications for payment of money by a receiver, the latter ought to appear and give information to the Court about funds in his hands and whether there are any attachments or claims on the same.[2]

(*i*) Liability to account.

The Code provides that every receiver shall pass his accounts at such periods and in such form as the Court directs and pay the balance due from him thereon as the Court directs.[3] The Rules and Orders prescribe that the Court Receiver is to account half yearly and to pay balances into Court and the Master is required to report any default of the officer in these respects.[4] Other receivers are required to pass their accounts on oath once in every year, but instead of the annual periods longer or shorter periods may be fixed at the Master's discretion. The days upon which the balances are to be paid into Court are fixed, and if there be default on the part of the receiver the latter's commission or salary may be disallowed, and the receiver charged interest at 6 per cent. upon the balances neglected to be paid by him during the time the same shall appear to have remained in his hands, and the Master is required to report on the first day of the second and fourth terms in each year which of the receivers have not duly passed their accounts or paid in their balances.[5] A receiver should personally or

[1] High, § 272; Beach, § 318; but see *ante*, p. 249.

[2] *Chaitan Charun Mullick* v. *Gocool Chandra Mullick*, 1 C. W. N., 303 (1897).

[3] Civ. Pro. Code, § 503, cls. (*f*), (*g*).

[4] Rules and Orders 19.

[5] *Ib.*, 20; *see* Kerr, 226; although a receiver is only bound to pass his accounts at the periods appointed he may at any time apply to the Court to pay in monies in his hands: Kerr, 223. It is no excuse to say that the circumstances of the estate made it necessary to keep large sums in hand where there has been a direction to pay in: *Hicks* v. *Hicks*, 3 Atk., 274; as to the consequences of default and putting recognisance in suit against sureties, *see* Kerr, 224, 230.

by a subordinate keep correct and accurate accounts of the receipts from and expenditure upon the estate, obtaining vouchers for all, other than petty, sums paid.[1] It is of great importance that a receiver should file his accounts with regularity and promptitude.[2]

The procedure upon rendering and passing accounts in the High Court is as follows :—

When the receiver's half-yearly account is ready and signed he gives notice to the parties that the account is ready and that they may inspect before filing. A date is mentioned in the notice as the date of filing.

Upon the account being filed in Court with vouchers in support of the amount, one of the Assistant Registrars goes through the account, and if it is found in order it is set down on a Saturday before a Judge in Chambers for the purpose of being passed. If any party objects to the account or any part of it he files his objections and the objections are brought on and disposed of at the time fixed for passing of the account.

Coomar Sattya Sankar Ghosal v. *Ranee Golapmonee Debee.*

The question of exceptions to the receiver's accounts, and the liability of receivers was fully discussed in the case undermentioned[3] in which the Court (Sale, J.) said :—

"The question now is whether these exceptions disclose any real or just ground for refusing to pass the accounts which the receivers have filed. I propose to deal with the exceptions to the accounts filed by both receivers at one and the same time, as what I have to say will apply to both sets of exceptions equally.

[1] *Balaji Narayan Pavardhan* v. *Ramchandra Govind Kanade*, I. L. R., 19 Bom., 660, 662 (1894).

[2] *Gonesh Chunder Doss* v. *Troyluckonath Biswas ; Re C. T. Davis*, Suit 294 of 1881, Cal. H. C., O. C. J., *Cor.* Trevleyan, J., 23 March 1887.

[3] *Coomar Sattya Sankar Ghosal* v. *Ranee Golapmonee Debee*, 5 C. W. N., 223 (1900).

"There is first a general ground of exception taken to these accounts and that is that they do not cover the whole extent of the liability or accountability of the receivers, inasmuch as they do not include the mofussil accounts of the estate. It seems to me this is not, strictly speaking, a matter of exception to the accounts filed. The only question which properly arises on an application by a receiver, to pass his accounts is as to the items of that particular account and involves the enquiry whether all his collections, made on behalf of the property of which he is the receiver, are duly entered in the accounts, and next whether all his disbursements are payments properly made in respect of the estate of which he is the receiver. These are the only matters which can be conveniently dealt with on an application to pass accounts. But it by no means follows that a receiver's liability is to be restricted to matters shown upon his accounts. If there is any liability attaching to the receiver other than that which appears on the face of the accounts, the proper course is to sue the receiver for the purpose of establishing that liability. It is impossible on an application to pass a receiver's accounts to go into serious questions with regard to his liability and responsibility, which are really not dependent upon the accounts filed by him, but arise independently of his accounts. Questions of this sort can only be satisfactorily dealt with by suit. There is, moreover, but little doubt as regards the question what the liability of a receiver really is. That liability is defined in section 503, Civil Procedure Code, and is also explained by Farran, J., in *Balaji Narain Pavardhan* v. *Ram Chandra Govind Kanade*.[1] The receiver is responsible for all properties

[1] I. L. R., 19 Bom., 660 (1894).

which came into his custody or management, and he is responsible not only for actual sums received by him, but for those which might have been received by him but for his wilful neglect and default. It is unusual and improper to raise questions with regard to the soundness or prudence of the system of management adopted by a receiver or to seek to charge him for wilful default or negligence on an application by him to pass his accounts. These are not matters which can be disposed of in the shape of exceptions to accounts. Applying these tests to the several exceptions which have been filed to the accounts submitted by the receivers, it appears that not a single one of these exceptions can be supported as a proper exception to these accounts. In not one of them is the objection taken that the receiver has received any sum which he has not properly credited, nor is there a single exception which charges that any payment or disbursement appearing in the accounts either has not been made by him as a fact, or, if made, was not made for the purposes of the estate. If any such questions had been raised by the exceptions, and it appeared there was substance in the dispute, it might have been necessary to refer such dispute or disputes for enquiry. But after a long hearing and careful examination of the matters raised by these exceptions, all I need say is that there does not appear to be one which has either been established or which would justify a reference for further enquiry. In substance the exceptions consist of objections more or less specific to the mode of management adopted by the receivers. Certain of them allege misconduct of the receivers in respect of the estate property as regards alleged improper compromises of claims or suits. Another class of exceptions complain that receivers have sanctioned methods on the part of the *naibs* or other

employés of the estate which are not justifiable. It is said also that instalment bonds have been improperly taken by the *naibs* for a consideration with the object of giving time to the debtors to pay their debts, and also that *nuzzurs* have been received by various employés of the estate and have not been credited. It is suggested in respect of all these matters that the management by the receivers has been at fault and has caused loss to the estate. I do not understand it to be suggested that the receiver is personally responsible in respect of bribes which the employés of the estate have received. But I am asked that an enquiry should be directed on these allegations for the purpose of establishing the fact that the management by the receivers has not been beneficial to the estate. All I need say is that there is nothing in the evidence to show that the receivers are in any sense personally responsible for the malpractices of the servants of the estate which are complained of, and even if a *primâ facie* case of responsibility on the part of the receivers had been made out, it seems to me that an enquiry of this sort would be foreign to the purposes and scope of the present application."

"I think, therefore, all these exceptions must be disallowed, but I should like to make some observations upon a matter which rises only incidentally upon these exceptions, but has been made the subject of considerable argument, and that is the objection to the effect, that the accounts filed by the receivers are improperly confined to sums that have come into their own hands and their dealings therewith."

"It is urged that in these accounts of the receivers there is no account included of the mofussil collections made by the employés of the estate, and it is contended that a receiver's accountability extends to all these collections

whether they came to the receiver's hands or not. My difficulty in respect of this argument is that I do not see how a question of that sort can be determined upon an application to pass accounts. It might have been necessary to adopt one or other of the following courses: to postpone the passing of these accounts until the question of the receiver's liability has been established by suit, or to pass the accounts reserving the right of the parties to establish any claim they may make against the receivers in a suit properly framed for the purpose."

"I do not think it necessary to take either of these courses. No suit has been instituted in respect of this matter, although the parties have had months to consider what they are pleased to call their discoveries, and in the next place, before I can take either of these courses, I must see if any real *primâ facie* ground of accountability was made out against the receivers in respect of this matter. It seems to me that the evidence now adduced entirely contradicts the alleged accountability. It is quite clear that the receivers from the first disclaimed all responsibility in respect of sums other than those directly remitted to them from the mofussil. That position was taken by the receivers from the very first, and there can be no stronger evidence of this fact than this, that from 1878, twenty-two years ago, accounts of the receivers filed in this Court have been confined to sums actually received by them, and this has been done with the approval and sanction of the parties and of the Court."

"The receivers have not included in their accounts the mofussil collections by the servants of the estate, and for this very good reason that the parties objected to the receivers having any control over the mofussil collections. From time to time one receiver after another has pointed out the difficulty which arises in respect of the management

of the estate by reason of all mofussil collections not being permitted to come to their hands, and on one occasion an application was made on the part of the then receiver that he ought to be allowed out of some large funds then available to form a reserve fund for paying Government revenue, and it was pointed out that if that was done it would enable the receiver to undertake the responsibility of paying Government revenue and of making all mofussil collections. But as usual, in the history of this suit, when any course has been suggested by the receiver for the benefit of the parties it is strongly objected to by them. They preferred the old system that the receiver should have no control over the *naibs*, that the *naibs* should make all local collections and disbursements including the payment of Government revenue, and how, on the face of this, the present applicant and his supporters can urge that the receiver is responsible for the acts of the *naibs* I fail to understand. The receiver can only be responsible for mofussil collections if he is in a position to exercise control over them. But here the parties insist upon the accountability of the receivers and at the same time object to put them in a position to exercise effective control."[1] * * * * *

Under these circumstances it seems to me that the applicant has failed to show that *primâ facie* ground exists for supposing that the receivers are liable for any thing except that which appears in their accounts. I express no opinion whether this finding will affect in any way any issue which the parties may seek to raise by suit as to any larger accountability on the part of the receiver.

[1] *Coomar Sattya Sankar Ghosal v. Ranee Golapmonee Debee*, 5 C. W. N., pp. 227—230.

"I must disallow all the exceptions, and I pass the accounts filed and direct that the applicants who filed exceptions do bear and pay their costs and pay the receiver's costs. The receivers will be entitled to their costs as between attorney and client." [1]

The Court gave the receiver liberty to pay the costs sanctioned and debit the same to the shares of the parties who had filed exceptions.

A Court having appointed a receiver in a suit, has authority, incidental to its jurisdiction, to order him to account, although the suit may be no longer pending. The estate is in its hands, and the receiver is its officer, and the dismissal of the suit by an Appellate Court does not alter that state of things. The Original Court in such a case may permit parties interested to intervene on questions as to the accounts, and may deal with costs and other matters.[2]

In a suit, by a plaintiff interested in the estate, wholly based on the alleged illegality of its transfer, by the executors named in the will of a Hindu, to the Administrator-General (Act II of 1874, section 31), decrees were made by the High Court, Original and Appellate, in the plaintiff's favour. The Judicial Committee, however, held the transfer legal; and the suit, brought against the Administrator-General and the executors as co-defendants, was dismissed. *Held*, on the plaintiff's petition for such modification of the order dismissing the suit as would maintain what had been ordered below

[1] *Coomar Sattya Sankar Ghosal* v. *Ranee Golapmonee Debee*, 5 C. W. N., 231.

[2] *Administrator-General of Bengal* v. *Prem Lall Mullick*, I. L. R., 22 Cal., 1011 (1895). A receiver may be ordered to pass his accounts and pay over the balance although the action has been dismissed. *Pitt* v. *Bonner*, 5 Sim., 577, or the proceedings have been ordered to be stayed. *Painter* v. *Carew*, Kay, App. 3644; Kerr, 225.

relating to the accounts, thereby enabling the High Court to bring matters in dispute to an end, that there were no grounds for the amendment. Their Lordships' opinion was that the High Court would not be deprived of any jurisdiction in that respect by the dismissal of the suit. If it should be necessary to the carrying out of the transfer that the Administrator-General should take proceedings, he could do so. To make orders upon the Court's receiver was within its powers; and either the receiver or the executors could be called to further account without the petitioner being met by the defence of prior adjudication of the matter (section 13 of the Code of Civil Procedure).[1] During the course of the judgment their Lordships observed as follows:—

"As to the first of these reasons, although a receiver has been appointed, who now holds and administers the estate of the testator, he is merely the officer of the Court, and the estate must, for all legal purposes, be regarded as being *in manibus curiæ*. It appears to their Lordships to be extravagant to suggest that the Court has not ample jurisdiction, without the aid of a pending process, to require accounts from their own officer, to permit parties interested to intervene in the examination of these accounts, to make just allowances to their officer for his administration, and to deal with all questions of costs connected with the investigation of his accounts as between him and any parties interested who may be allowed to appear and take part in it."[2]

The same remedies appear to be available against a receiver after he has been discharged.[3] So where a receiver who had been discharged had not paid his balance he was ordered to pay in the same and also the

[1] *Ib.* [2] *Ib.* [3] Kerr, 226.

amount allowed for his salary together with interest on both sums at 5 per cent. from the day appointed and to pay the costs of the application.[1]

Where the receivers' employés to whom the management had been improperly delegated had misappropriated funds, a reference was made to take an account of the receivership charging the receiver with all sums actually received by him, or which, but for his wilful default, he ought to have received, on the best basis which, under the circumstances, he can adopt.[2]

As to the rights and duties of receivers of attached property, see further § 26 of Chapter IV.

[1] *Harrison* v. *Boydell*, 6 Sim., 211.

[2] *Balaji Narayan Pavardhan* v. *Ramchandra Govind Kanade*, I. L. R., 19 Bom., 660, 663 (1894).

CHAPTER VI.

Removal of Receiver and Discharge of Receiver and Sureties.

§ 30. Jurisdiction to remove and discharge receiver.
§ 31. Removal of receiver—
(*a*) upon his own application,
(*b*) upon the application of the parties.
§ 32. Final discharge of receiver.
§ 33. Discharge of sureties.

§ 30. The power to terminate flows naturally and as a necessary sequence from the power to create. The power of the Court to remove or discharge a receiver whom it has appointed may be exercised at any stage of the litigation. It is a necessary adjunct of the power of appointment and is exercised as an incident to, or consequence of, that power; the authority to call such officer into being necessarily implying the authority to terminate his functions when their exercise is no longer necessary, or to remove the incumbent for an abuse of those functions or for other cause shown, and the cases upon this branch of the subject will resolve themselves into two classes, *viz.*, cases of removal or substitution for cause, and cases of final discharge because of the necessity of the appointment having ceased to exist.[1]

Jurisdiction to remove and discharge.

A distinction indicated by the terms themselves is to be drawn between the removal and the discharge of a receiver. The discharge of the receiver is, in general,

[1] High, §§ 820, 826.

the termination of the receivership, while the removal of the receiver upon his own motion or for cause, and the substitution of another person or persons in his stead, is a proceeding not inconsistent with the continuance of the receivership. The rules of law, however, which regulate the removal of a receiver are, in general, applicable to the case of his discharge. A receiver is removed when it is made to appear that the interests of the parties concerned require it, and a receiver is discharged when the objects sought to be obtained by his appointment have been accomplished. In the one case the property in litigation continues in the possession of the Court, subject to the final decree, while in the other case it passes pursuant to the decree to the party entitled. The power of removal being incident to the power of appointment, the Court whose officer the receiver is, may, in a proper case, direct his removal, and may impose such conditions in connection therewith as seem just. The Court is not limited in respect of time in the matter of the removal of the receiver, but may act thereon whenever it seems proper and at any stage of the litigation.

As regards the power of the Court to remove a receiver for cause and to substitute another in his stead, it is to be observed that the exercise of the power is regarded as a matter properly vesting in the sound discretion of the Court, and hence to be governed by the circumstances of the particular case. It is difficult therefore to frame any definite rules susceptible of general application, and the power of removal for cause is referred to the broad and undefined region of the discretionary jurisdiction of Courts of Equity.[1] The removal of a receiver and the appointment of another in his stead does not

[1] High, § 821; Beach, § 776.

have the effect of invalidating claims against the former receivership, since the management of the estate is one and the same, though it becomes necessary to change the receiver.[1] All proceedings which directly affect the receivership ought regularly to be commenced in the same suit and before the same Court in which the appointment of the receiver was made. Accordingly a proceeding to remove or suspend a receiver must be commenced by motion in the suit in which he was appointed. It was the early rule in equity that the application for the removal of the receiver could be made only to the Court by which he had been appointed and whose officer he was.[2]

If a person has any reasons to urge why a receiver should be discharged or put out of possession, application must be made to the Court in which the suit is filed and in which the receiver has been appointed.[3]

The application to remove or discharge a receiver is ordinarily made upon motion in the cause in which he was appointed on notice to all parties and the receiver, or the direction for the discharge may be given in the decree at the hearing or in the order upon further considerations.[4] The general rule, however, is that where a receiver is served with a petition in the cause he should not appear and will get no costs of appearance if he does so.[5] Therefore a receiver, though served, is not entitled to

[1] High, § 827.

[2] *Ib.;* it is here pointed out that this doctrine has been essentially modified in the United States in which a receiver may under various circumstances be removed by Courts other than that by which he was appointed. This qualification of the rule was an almost necessary outgrowth of the complex system of State and Federal Courts and of the power of the removal of causes from one of these classes of Courts into the other. It is also sometimes provided for by Statute. See *Buddinath Paul Choudhry* v. *Bycaunt Nath Paul Chowdhry*, 2 Tayl. & Bell, 192, 193, [a receiver is only amenable for his acts and accountable to the Court appointing him.]

[3] *Dinnonauth Sreemonie* v. *C. S. Hogg*, 2 Hay, 395, 396 (1863).

[4] Kerr, 238, 239.

[5] *Ib.*, 215; *Herman* v. *Dunbar*, 23 Beav., 312.

appear at the hearing of the application unless a personal charge is made against him. If he appear he will not be allowed the costs of his application,[1] except in a special case.[2]

Upon a motion to vacate an order appointing a receiver, the motion being made by the defendant and assented to by plaintiff, the receiver himself should not be heard in opposition, since he is not a party in interest and has no standing in Court to oppose the motion, and cannot interfere in questions affecting the rights of the parties or the disposition of the property in his hands.[3]

Removal of the receiver.

§ 31. As already observed, this may take place either upon the application of the receiver himself appointed in the cause or upon the application of the parties thereto over whose property he has been appointed. As to receivers of attached property see further § 22, *ante*.

(*a*) Upon his own application.

It is not, in general, the policy of the Courts to remove a receiver upon his own application after he has once accepted the office and entered upon the discharge of his duties. This is the rule partly because of the unwillingness of the Courts to charge the estate with the expense of such a proceeding and partly because it is contrary to the theory upon which justice is administered in a Court of Equity to allow charges of this nature which necessarily cause delay in collecting and settling the affairs of the estate affected by the receivership. It may be laid down therefore as a settled rule that the Court will not remove or discharge a receiver except where good cause therefor can be shown, and it seems also that generally this must be something arising

[1] Kerr, 239; *Herman* v. *Dunbar*, supra.

[2] *General Share Co.* v. *Wetley Brick Co.*, 20 Ch. D., 260, 267, where an applicant who had improperly served the receiver was ordered to pay his costs of appearance: but the circumstances were peculiar.

[3] *L'Engle* v. *Florida Central Ry. Co.*, 14 Fla., 266 (Amer.) cited in High, § 830.

subsequently to the acceptance of the office.[1] Accordingly where the receiver accepted the office at the request of the defendant and was subsequently incapacitated from performing the duties of his office by reason of blindness he was discharged upon his own petition ;[2] but where the motion for relief was based upon the fact that the duties of the receivership interfered with the receiver's own private business, the application was refused.[3] In a case where the receiver wanted to go to Europe on his own affairs and remain a year, the Court allowed the receiver to be discharged, gave him his costs and appointed a new receiver.[4] A receiver who wishes to be discharged and cannot show any reasonable cause for putting the parties to the expense of a change will not be discharged on his own request, unless on the terms of his paying the cost of the appointment of another receiver and consequent thereon; but where a receiver had acted for many years and had paid in his balance, the Court would not charge him with the costs of his removal and the appointment of a new receiver.[5] A receiver ought not to present a petition to be discharged, to come on with the cause on further directions, as the Court would make the order on further directions without such petition.[6]

(*b*) Upon the application of the parties.

It is, as of course, an elementary proposition that a Court of Equity will not sanction or continue a receivership which has been created collusively or fraudulently, and

[1] Beach, § 782; Kerr, 233, 234; High, § 838; *Smith* v. *Vaughan*, Cas. *temp* Hardw., 251; *Richardson* v. *Ward*, 6 Madd., 266; Edwards on Receivers, 660.

[2] *Richardson* v. *Ward*, 6 Madd. Ch., 266, where the receiver was allowed the costs of the proceeding.

[3] Beach, § 782, citing *Beers* v. *Chelsea Bank*, 4 Edw. Ch., 277.

[4] *Purdy* v. *Rapalje*, cited in Edwards on Receivers, 661, and referred to in Beach, p. 733.

[5] Kerr, 234, citing *Cox* v. *Macnamara*, 11 Ir. Eq., 356.

[6] *Stillwell* v. *Mellersh*, 20 L. J. Ch., 356.

that a receiver so appointed will be removed upon proof that the appointment was made by collusion between the parties, or in fraud of the rights of any of the parties in interest.[1] When it subsequently appears that the appointment was improvidently made, the Court may unquestionably vacate the appointment and thus remove the receiver ; but the Court may properly require as a condition precedent to an order vacating the appointment that the receiver's expenses and compensation be provided for by the moving party. Where the receiver's security is insufficient the Court may remove him summarily and direct the delivery of all the assets to his successor, if he neglect or refuse to procure additional sureties.[2] Where a receiver becomes bankrupt he will be discharged and a new receiver appointed.[3] If a receiver has been wrongly appointed over property of a person not a party to the cause he will be discharged, although there has been an abatement by the death of the sole defendant.[4] When a receiver has been appointed temporarily in an *ex parte* proceeding, or before answer, and it subsequently appears from the defendant's pleading or otherwise that the appointment ought not to have been made or that the complainant has presented no case for the intervention of a Court of Equity, it is proper that the receiver should be removed. So where it is made to appear that there was no necessity for the appointment of the receiver, or where it is shown to the satisfaction of the Court that all the usual grounds for the appointment of a receiver—such as imminent danger to the property, fraud, insolvency, and the like—are wanting, the Court will remove the receiver and restore the *status quo*. But

[1] Beach, § 784.
[2] Beach, § 775.
[3] Kerr, 236 : Dan. Ch. Pr., 1716.
[4] *Ib.*, 237, citing *Lavender* v. *Lavender*, Ir. R., 9 Eq., 593.

where a receiver enters in good faith upon the discharge of his duties and the parties in interest acquiesce for a considerable time, their laches may be such as to defeat a subsequent application on their part looking to the removal of the receiver.[1] Since absolute impartiality as between the parties to the litigation is an indispensable qualification of a receiver, upon an application for his removal, the Court may properly consider his past relations to the parties as well as his present sympathies. And when it is shown that he was the nominee of one hostile party and bitterly opposed by the other and that he was appointed under the mistaken belief that all interests had united in his selection and that by reason of his interest his efficiency as an officer of the Court is impaired, it is proper to remove him.[2] The mere fact of relationship between the receiver and the plaintiff in the action in which he was appointed, is not, of itself, sufficient ground for his removal, such relationship affording, at the most, merely a circumstance to be taken into consideration at the time of his appointment, it being the general rule that no relative of either of the parties ought to be selected as receiver. But where, in addition to relationship, bias and improper conduct are shown, a ground is made for his removal.[3]

It is an established rule that a receiver will not be arbitrarily removed and another person substituted in his place in the absence of a substantial ground and merely because certain parties in interest desire it. But it is competent for the Court to remove one receiver and to substitute another in his stead, by consent of all parties when the proceedings are *bonâ fide* and when there is no attempt to traffic in the receivership.[4] Where a receiver

[1] Beach, § 780.
[2] High, § 821.
[3] Beach, § 786; High, § 821; and as to where a party in interest has been appointed *see* Beach, § 790.
[4] *Ib.*, § 789; High, § 827.

had been appointed in an administration suit, another receiver who would act at a lower salary was, on the application of a mortgagee of a tenant-for-life of the property, ordered to be substituted for him.[1]

The rule that a receiver may be removed for misconduct or breach of trust arises out of the nature of the office and the supervising power of the Court of Chancery. Whenever the receiver is guilty of misfeasance or malfeasance in office it is the duty of the Court to call him to account, and in a proper case it has the undoubted right to order a summary removal.[2] Either mismanagement or incompetence is a ground for removing a receiver.[3] A receiver will be removed if his appointment has been an improper one,[4] if he is irregular in carrying in and passing his accounts :[5] if his conduct has been such as to impede the impartial course of justice ;[6] or to amount to gross deriliction of duty ;[7] and when a receiver appointed on behalf of incumbrancers has been guilty of gross negligence in the discharge of his duties, he may be removed upon their application and may be required to pay interest upon the balances from time to time in his hands and to pay the costs of the proceeding for his removal.[8] Upon a petition to remove a receiver the two sureties joining in the petition and one of the charges of misbehaviour against the receiver was his letting the owner of the estate continue

Stanley v. *Coulthurst*,—W. N. (1868), 305.

[2] Beach, § 783.

[3] *Gonesh Chunder Doss* v. *Troylucko Nath Biswas*, Re *C. T. Davis*. Suit 294 of 1881, Cal. H. C., O. O. C. J., cor. Trevelyan, J., 23rd March, 1887.

[4] Re *Lloyd*, 12 Ch. D., 448 ; *Neilman* v. *Neilman*, 43 Ch. D., 198 ; Re *Wells*, 45 Ch. D., 569; *Brenan* v. *Morissey*, 26 L. R., Ir. 618, cited Kerr, 236.

[5] *Bertie* v. *Lord Abingdon*, 8 Beav., 53.

[6] *Mitchell* v. *Candy*, W. N., 1873 232, cited in Kerr, 236.

[7] *Ib.*, citing Re *St. George's Estate*, 19 L. R., Ir. 566.

[8] *Ib.*, High, § 829.

in possession of part, by whose going beyond sea a loss was likely to happen to the estate, Lord Hardwicke said : "That (the sureties joining in the petition) varies not the case : for if people voluntarily make themselves bail or sureties for another, they know the terms; and will be held very hard to their recognisance ; and not discharged at their request to have new sureties appointed ; for then there would be no end of it. It does not appear he could get better sureties. No regard therefore is due to their application, unless for benefit of the parties in the cause or something of that kind. The course of the Court is, that if a receiver is appointed and the owner of the estate is in possession of part of the premises, application should be made to the Court that the owner should deliver possession to the receiver, who cannot distrain on the owner in possession as he is not tenant to him. If therefore a loss arises, it was the parties' fault in not applying for that."[1]

On an application to remove a receiver for incompetence and mismanagement where the applicants obtained the order, but a large number of charges had been brought, which should not have been brought and which had been met by the receiver who, it was not suggested, had been dishonest ; the applicants were given costs of application out of the estate on scale No. 2 as between attorney and client, the Court observing as follows :— "With regard to Mr. Davis' costs I have considered the matter very anxiously. No doubt he has necessitated this action, but, on the other hand, a large number of charges have been brought which have been met and which should not have been brought. The receiver has been put to expense on account of these unnecessary charges. Under

[1] *Griffith* v. *Griffith*, Vezey. Clas. temp Hardw., 400.

the circumstances but with much diffidence and bearing in mind that it has not been suggested that he has been dishonest, and inasmuch as the expenses of meeting this application might have been limited to the expenses of an ordinary motion, if it had been confined to the charges which have been substantiated ; I think I can give him his costs out of the estate. Cost will be taxed as on a hearing in a suit on scale No. 2. There will be a direction to the taxing-officer to allow such costs as are printed in Rules 10, 14, 16 of Schedule II (Belchambers, Rules and Orders, 332)."[1]

By a decree in an administration suit, *A* was appointed receiver "to manage the estate." *A* died, and by a subsequent order *B* was appointed receiver. One of the defendants in the suit applied to have *B* removed from the office of receiver on the ground of his alleged mismanagement of the estate. The application was refused. *Held* that the order of refusal was appealable, whether the former Code or the present Code of Civil Procedure was deemed to be applicable, being an order made in respect of a question arising between the parties to a suit relating to the execution of the decree.[2]

Final discharge of the receiver.

§ 32. The discharge of a receiver may take place either during the course of the proceedings or at the conclusion of the litigation. A receiver is generally continued until judgment, but according to the decision undermentioned[3] if the right of the plaintiff ceases before that time the receiver may be discharged and cannot be continued at the instance of the defendant. In this case the plaintiff claiming to be an equitable creditor or incumbrancer of

[1] *Gonesh Chunder Doss* v. *Troylucko Nath Biswas*, Re *C. T. Davis*, Suit 294 of 1881, Cal. H. C. O. O., C. J., Trevelyan, J., 23rd March, 1887.

[2] *Mithibai* v. *Limji Nowroji Banaji*, I. L. R., 5 Bom., 45 (1880).

[3] *Davis* v. *Duke of Marlborough* 2 Sw., 167, 168.

the defendant had obtained a receiver of the rents and profits of defendant's real estate upon which he claimed to have a charge. Defendant having paid and plaintiff having received the amount claimed to be due, the receiver was discharged, although other defendants claiming to have annuities or incumbrances upon the same property objected and asked to be heard against the discharge. Lord Eldon said: "I apprehend that with the right of the plaintiff to have the receiver must fall the rights of the other parties. It would be most extraordinary if, because a receiver has been appointed on behalf of the plaintiff, any defendant is entitled to have a receiver appointed on his behalf. My decided opinion is that the order for the receiver must be discharged and that all falls together." In however a subsequent case[1] the Master of the rolls said: "There is no doubt, that where a receiver is appointed under the authority of the Court, he is appointed for the benefit of all parties interested: and therefore he will not be discharged merely upon the application of the party at whose instance he was appointed."[2] And the decisions of the American Courts appear to be to the same effect.[3] It has been said:[4] "The better doctrine, however, as deduced from the clear weight of authority and from the better legal reasoning is directly the reverse. And since the appointment of a receiver is regarded as being made for the benefit of all parties in interest in the litigation, he will not be discharged merely upon the application of the party at whose instance he was appointed, after his demand against the defendant is satisfied, when the rights of other

[1] *Bainbrigge* v. *Blair*, 3 Beav., 421.

[2] In other cases also of a somewhat similar character proceedings have been stayed without prejudice to the order appointing a receiver; Kerr, 235

[3] High, § 837; Beach, § 793.

[4] High § 837.

parties are involved. The duty of the Court being to protect the rights of all parties in interest and not merely those of the plaintiff at whose suit the extraordinary aid of the Court has been invoked, it will not permit the receiver to be discharged upon the consent of the plaintiff, when it appears that the discharge may prejudice the rights of other parties to the action who do not consent thereto." Thus when a legatee under a will has filed a bill on behalf of himself and of such other creditors and legatees as may come in under the decree, to obtain satisfaction of his legacy, and has joined as a defendant an incumbrancer having a charge upon the estate, the receiver will not be discharged upon the consent of the plaintiff without the consent of such incumbrancer;[1] nor where a receiver has been appointed on behalf of infant tenants in common, will he be discharged as to the share of one of them who has attained twenty-one.[2]

If during the course of the proceedings the continuance of a receiver becomes unnecessary or the object of the receivership is attained, the receiver will be discharged. So where trustees were removed on account of misconduct and a receiver appointed, the latter may be discharged upon the appointment of new trustees.[3] Where a receiver of the property of a decedent had been appointed pending the determination of the rights

[1] *Largan* v. *Bowen*, 1 Sch. and Lef., 296.

[2] *Smith* v. *Lyster*, 4 Beav., 227, 229. Even where a case arises for discharge, in order to enable discovery to be made of defalcations Lord Kenyon held and Lord Eldon approved the rule that a receiver should not have his recognisance discharged until one year after the infant has obtained his age of twenty-one. *Anon.* cited 2 Madd. Ch., 298.

[3] *Bainbrigge* v. *Blair*, 3 Beav., 421, 423; *Secus* if there are questions still outstanding on the appointment of new trustees. Kerr, 235, citing *Reeves* v. *Neville*, 10 W. R., 335, and see Beach, § 798.

of various claimants thereto, upon the appointment of an administrator *pendente lite* the receiver was discharged.[1] So also, in a case where a receiver had been appointed at the suit of an annuitant, he was discharged on the payment of the arrears of the annuity, there being no reason under the circumstances of the case why he should be continued:[2] and so also a receiver was discharged when the object of his appointment had been fully effected.[3]

When a receiver has been improperly appointed over property belonging to a person not a party to the cause, the Court will order the discharge of the receiver although the cause has abated by the death of the sole defendant.[4]

Although every person who considers himself aggrieved by the appointment of a receiver, has, in general, the right to relief in case it can be shown that the receivership is unauthorized, it is nevertheless the rule that the proper form of relief is not necessarily a direct and immediate application to the Court for the discharge of the receiver. It is, therefore, a matter of moment to determine who may properly make a motion for discharge.[5] Thus it has been held that where a receiver has been appointed in an action to enforce a trust contained in a will, and as such receiver has taken possession of certain lands covered by a mortgage, the mortgagee, though not a party to the suit, may apply for the discharge ;[6] for under English law a mortgagee was entitled

[1] *In re Colvin*, 3 Md. Ch., 297 (Amer.) cited in Beach, § 798.

[2] *Braham* v. *Strathmore*, 8 Jur., 567.

[3] *Tewart* v. *Lawson*, 18 Eq., 490; see *Hoskins* v. *Campbell*, W. N. (1869), 59; Kerr, 236.

[4] *Lavender* v. *Lavender*, Irish Reports, 9 Eq., 593, cited in High, § 832.

[5] Beach, § 793.

[6] *Thomas* v *Brigstocke*, 4 Russ, 64. *See* also Re *Southern Railway Co.*, 17 L. R., Ir. 137, cited in Kerr, 237.

to the immediate possession of the mortgaged premises, and that, if a receiver were appointed, any steps taken to obtain possession without leave of the Court would constitute a contempt, even though the possession of the receiver were wrongful; hence such an application as this would be the only relief in this class of cases.

A defendant to the action in which the receiver is appointed, has the right to move, *pendente lite*, for the discharge of the receiver, without regard to the question whether the appointment had been opposed or not.[1] The general ground upon which the application is based must always be the satisfaction of the plaintiff's claim; the payment of the judgment and its satisfaction of record after the appointment of a receiver on supplementary proceedings, does not, however, *ipso facto*, operate to discharge the receiver, but the debtor may obtain an order of discharge upon payment of his lawful charges.[2]

While the propriety of discharging a receiver, like that of appointing him, is to some extent a matter of judicial discretion, yet in some cases the right to a discharge becomes an absolute right which the Court has no discretion to refuse;[3] in such a case therefore the granting of the order of discharge is not a matter of discretion, but its refusal is error which may be reversed on appeal.[4] The question of discharge is sometimes complicated by the rights of third persons who are parties to the action, and it is a matter to be determined by the view which the Court takes upon the question whether the receiver, being appointed upon the application of one of the parties to the cause, can be treated as acting for the benefit of all, and, further, with reference to the question

[1] *Grenfell* v. *Dean and Canons of Windsor*, 2 Beav., 544.
[2] Beach, § 793.
[3] High, § 840.
[4] *Ib.*, Beach, § 793.

whether the receivership will be continued even though the party on whose application the receiver was appointed consents to the discharge.[1]

Where estates have been decreed to be sold, the receiver will be continued until the conveyances are executed under the decree in order that he may collect the arrears of rent.[2]

A Court of Equity, as of course, is always ready to rectify improper or irregular proceedings and where an application for a receiver has been allowed and it subsequently appears that the appointment was improper, the receiver will be discharged.[3] So in the case already cited[4] where a receiver was appointed of property which was owned by a person not a party to the action, and that fact was subsequently established to the satisfaction of the Court, the receiver was discharged. And where a receiver was appointed on an *ex parte* application upon the ground that the defendant being in possession was selling and converting property held under a mortgage and was insolvent and that there was imminent danger that the plaintiff would lose his debt, all of which allegations were fully denied by the answer the receiver was discharged.[5] Inasmuch as the receiver is appointed upon the theory that thereby the interests of all the parties concerned will be the better subserved, protected and secured, it follows as of course, that whenever at any stage of the litigation subsequent to the appointment, these interests will be promoted by the discharge of the receiver, it is the proper practice to move therefor.[6] Thus where a receiver of the property of a bank was appointed with

[1] v. *ante*, p. 279.

[2] *Quinn* v. *Holland*, Ridg. temp. Hard, 295.

[3] Beach, § 794.

[4] *Lavender* v. *Lavender*, Irish Rep., 9 Eq., 593.

[5] *Furlong* v. *Edwards*, 3 Ind., 99 (Amer.), cited in Beach, § 794.

[6] Beach, § 796.

the consent of the management, on the ground of insolvency and an application was subsequently made that the receiver be discharged, upon the ground that the bank had become solvent and that the rights of the creditors would be subserved, because their claims could then be immediately paid, it was held proper to discharge the receiver.[1]

In general a receiver will not be discharged until the object for which he was appointed has been fully accomplished, or until the Court is satisfied that the exigency calling for a receiver has ceased.[2]

A plaintiff cannot obtain an order discharging a receiver and directing him to make over the property in his hands before he has established his title. In an administration suit a receiver was appointed and was by order continued upon a preliminary decree for administration being made. It was held upon an application by the plaintiff that no order could be made for the discharge of the receiver and directing him to make over possession of the estate to the plaintiff before the completion of the administration decree.[3]

Since the final decree in the cause is generally decisive of the subject-matters in controversy, and determines the right to the possession of the fund or property held by the receiver, it is usually the case that such decree supersedes the functions of the receiver since there is then nothing further for him to act upon. If on the one hand the result be favourable to the defendant the functions of the receiver are at an end and it is proper to order him to account and be discharged.[4] An order

[1] Beach, § 796, citing *Ferry* v. *Bank of Central New York*, 15 How. Pr., 445.

[2] See *Smith* v. *Lyster*, 4 Beav. 227.

[3] *Bhugwan Das Sureka* v. *Heera Lal*, 5 C. W. N., 417 (1901).

[4] Beach, § 799.

of dismissal of the suit which follows on the reversal of an order appointing a receiver clearly operates as a discharge of the receiver.[1] Under the Civil Procedure Code, once a suit has been dismissed, the Court dismissing it is *functus officio* except that it may stay execution of its own decree or order for costs. Its jurisdiction extends no further in regard to a suit which has ceased to be a pending suit.[2] If, on the other hand, the controversy terminate favourably to the plaintiff or the party at whose instance the receiver was appointed, it will usually devolve upon him to carry out the decree of the Court according to the nature of the receivership and his powers under the decree.[3] It has been said that the determination of the suit, however, will not, *ipso facto*, discharge the receiver, but his functions must be terminated by a formal order of Court.[4] A receiver was appointed in a testamentary suit in which judgment was given declaring the will to be a genuine document, ordering probate to issue, and discharging the caveat which had been entered. The applicant for probate upon the conclusion of the judgment applied that the receiver might be discharged. It was objected that a substantive application for that purpose should be made. This, however, was held to be unnecessary, and the Court ordered that the receiver should out of funds first pay the duty in respect of the probate, and upon the grant of probate he be discharged and pass his accounts.[5] Unless the minutes of the order appointing or continuing a receiver and manager contain a provision for his discharge, an application to the Court is in general

[1] *Prem Lall Mullick* v. *Sambhoo Nath Roy*, I. L. R., 22 Cal., 960-973 (1895).

[2] *Yamin-ud-doulah* v. *Ahmed Ali Khan*, I. L. R., 21 Cal., 561, 563-565 (1894); *see* Author's Injunctions, 70-73.

[3] Beach, 799.

[4] *Ib.*, High, § 834.

[5] In the goods of *Luchminarain Bogla*, deceased, 5 C. W. N., cclxi (1901).

necessary to divest the possession of the receiver. The appointment of a receiver made previous to judgment will not be superseded by it unless the receiver is only appointed until judgment or further order.[1] The receiver may, however, be continued by the decree.[2] The Court has jurisdiction notwithstanding a receiver has been discharged, to surcharge him in his accounts;[3] or to order him to pay his balance together with the amount allowed him for his salary and interest.[4]

When the Court has taken possession of an estate by a manager or consignee, it will, as against all parties for whose benefit the possession has been held, refuse to permit its officers to be discharged until the amount due to them has been paid.[5]

A receiver though discharged by the dismissal of the suit in which he was appointed is entitled to a lien on the estate for all his just claims and allowances; and the Court will not compel a receiver, who has been discharged, to make over the property in his possession until his lien has been satisfied or provided for by a sufficient indemnity.[6]

The decree may direct a permanent appointment, in which case the discharge of the receiver is a matter of discretion. The undermentioned case[7] was an appeal from an order (17th February, 1888) of the High Court,

[1] Kerr, 232.

[2] See *Moti Vahu* v. *Prem Vahu*, I. L. R., 16 Bom., 511, 512 (1892).

[3] Re *Edwards*, 31 L. R., Ir. 242, cited in Kerr, 240.

[4] *Harrison* v. *Boydell*, 6 Sim., 211.

[5] *Fraser* v. *Burgess*, 13 Moo. P. C., 346, cited in *Moran* v. *Mittu Bibee*, I. L. R., 2 Cal., 69 (1876).

[6] *Premlall Mullick* v. *Sumbhoo Nath Roy*, I. L. R., 22 Cal., 960, 973 (1895). The order made in this suit was "that the receiver do proceed to pass his final accounts and on satisfaction of what may be due to him and on being sufficiently indemnified as to any engagements properly entered into by him during his management of the estate, he do make over possession to the Administrator-General." Costs of the receivers were directed to be paid out of the estate and to be taxed as between attorney and client.

[7] Exparte *Rani Mathusri Jijai Amba*, I. L. R., 13 Mad., 390 (1890).

affirming an order (13th September, 1887) of the District Judge of Tanjore. A Divisional Bench of the High Court (Collins, C. J., and Parker, J.) made the above order on the petition filed in the original Court on 24th August, 1887, by the surviving widows of the last Maharajah of Tanjore, they having been parties to a decree in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*.[1] That decree (8th May 1868) declared "that the permanent appointment of a receiver and manager of the property was necessary;" and directed "that the Collector, if possible, should be continued as receiver and manager;" that, if such was not practicable, the Civil Court of Tanjore should appoint a receiver and manager after taking proper security, and from time to time make fresh appointments during the lives of the widows and the survivors or survivor of them, or until it shall be considered by the Civil Court that a receiver and manager is no longer necessary."

The reason given in the order from which this appeal was preferred was thus given :—

"The decree clearly contemplates that the receiver shall be permanent during the lives of the widows, and the survivors or survivor, of them; and having regard to the history of the litigation, the nature of the property, and the circumstances of the family, we are clearly of opinion that the District Judge exercised a right discretion in refusing this application."

Ex parte *Rani Mathusri Jijai Amba.*

All the parties having joined in applying for a certificate under section 602, Civil Procedure Code, the same Judges recorded their reasons, more fully, as follows :—

"As the surviving Ranis are the only persons at present entitled to participative enjoyment of the estate,

[1] 3 Mad. H. C. Rep., 424.

and as all have united in this application, we think that there is a substantial question of law which will admit of an appeal to the Privy Council within the meaning of section 596 of the Civil Procedure Code, but we think it right to place on record our reasons for holding that the District Judge exercised a sound discretion in refusing to grant the prayer for the removal of the receiver. The circumstances of the litigation, which led to the appointment of a receiver, are fully reported in the third volume of the Madras High Court Reports, pp. 424-455. The property in question was seized by Government at the annexation of the Tanjore State, not under color of any legal title, but by the forcible exercise of Sovereign power. It was afterwards transferred to the senior widow by order of Government, dated 21st August 1862, as a matter of grace and favour. The order, after making over the management and control to Her Highness, went on to state :—'It will be her duty to provide in a suitable manner for the participative enjoyment of the estate in question by the other widows, her co-heirs. On the death of the last surviving widow, the daughter of the late Raja or, failing her, the next heirs of the late Raja, if any, will inherit the property.' Within four years of the transfer of this estate to the senior widow this suit was brought by two of the junior Ranis. They complained of various acts done by the senior widow in detriment of their rights, and more especially that she had, without their consent, adopted a boy as the son of the late Raja, to whose possession she had transferred or was about to transfer the whole property. That son was included as the fourteenth defendant, and the first defendant alleged that she herself and all the other Ranis were entitled only to receive maintenance from him. The Court held that the evidence as to the senior widow's management of the estate since it

had been under her charge, showed reckless dealing with the property and the lavish expenditure of large sums for purposes of which the accounts afford no satisfactory explanation. Not only has the large sum of ready money received from the Government and the whole proceeds of the immoveable property been dissipated, but a considerable portion of the moveable property itself has been got rid of and debts of a considerable amount been left unpaid. We are at the same time of opinion that it would be most imprudent to entrust the management of the property to the second defendant or to either of the other junior widows. Little, if anything, we are sure, would be gained as respects the care and preservation of the property, and there would very soon be violent disputes and further litigation. It appears to us to be absolutely necessary that the estate should remain in the custody and under the control and direction of a competent receiver and manager appointed from time to time by the Civil Court and invested with general powers for the management and regulation of the property and its enjoyment, and the application of the rents and profits. The Collector is at present the appointed receiver, and there is no doubt that it is of the very greatest advantage to the estate, and the parties interested, that he should continue to act as receiver and manager as we trust he will be able to do. The continuance of his appointment will therefore be decreed; but should it be necessary, the Civil Judge must appoint a fit and proper person in the Collector's place, taking sufficient security for the discharge of his duties and fixing a fair and reasonable remuneration for his services.

"The High Court, in the view that it took of the case, found it unnecessary to raise an issue as to the validity of the alleged adoption of the fourteenth defendant, observing

that if found to be valid (a result at present very problematic), his present claim by right of adoption being as lineal heir of the Raja in preference to the widows would not be maintainable. To that claim the absolute ownership of the Government in the interval between the death of the Raja until the act of State by which the transfer was made to the widows and daughter is, we think, fatal." *See* 3 Mad. H. C. Rep., p. 455.

"More than twenty years have passed since that decree, and we are of opinion that the same reasons which, in 1868, made the appointment of a receiver imperatively necessary still exist in all their force. Old age and twenty years more of that seclusion which is the lot of ladies of exalted rank in this country can hardly have made their Highnesses better fitted for the management of an estate whose annual income is more than 1½ lakhs of rupees and which was valued in 1868 as worth about 68 lakhs of rupees (the moveable property in jewels and cash alone being worth nearly 20 lakhs). If given back at all, the chief management would, under the terms of the Government order, vest in the senior widow,—a lady now over 70 years of age, and who twenty-four years ago, on 5th January 1864, intimated to the then Civil Judge of Tanjore that she had formed the resolution of withdrawing from all worldly transactions and transient pleasures, and resolved from that moment to lead a life of seclusion, &c.," *see* 3 Mad. H. C. Rep., p. 437. "For more than twenty years this decree has secured the estate and these ladies immunity from litigation,—but, at the death of the last surviving widow, the Government order vests the estate in the daughter of the late Raja or, failing her, in the next heirs of the late Raja if any." The Judges concluded by adverting to the probability of future litigation if the

management of the property should be restored to the widows.

On appeal to the Privy Council it was argued that under the Proceedings of the Madras Government of 21st August 1862, printed in the report of *Jejoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*[1] and the construction put upon it in the judgment in the latter suit, the property vested in the Ranis for the estates of Hindu widows. They, thereby, became full owners, and represented the estate, subject to the legal restrictions upon their disposing of the property. One of the incidents of a widow's estate was a right to management. Of this she could only be deprived on the objection of some one interested in the good management of the property; but no such objection was made here. The present application was supported by all who had a vested interest in the estate. The receiver had been appointed in consequence of the proceedings in a suit which had come to an end. Their Lordships were, however, of opinion that it was entirely a matter of discretion with the Court as to the removal of the receiver, and, looking to the case, their Lordships thought that the Court exercised a very sound discretion in not removing him, and the appeal was dismissed.[2]

Discharge of sureties.

§ 33. The sureties for a receiver will not be discharged at their own request, and no regard will be had to their application unless it is for the benefit of the estate or unless there be special circumstances in the case,[3] as for instance where underhand practice can be proved and the person secured can be shown to be connected with such practice.[4] Where also a surety had become such

[1] 3 Mad. H. C. Rep., 428.

[2] *Ex parte Rani Mathusri Jijai Amba*, I. L. R., 13 Mad., 390 (1890).

[3] *Griffith* v. *Griffith*, 2 Ves., 400; Kerr, 241.

[4] *Hamilton* v. *Brewster*, 2 Moll., 407; Kerr, 241.

in violation of partnership articles, he was discharged on his own application.[1] When a surety procures his discharge during his continuance of the receivership, the receiver must enter into a fresh recognisance with new sureties. When a surety becomes bankrupt the receiver is usually required to enter into a fresh recognisance with two or more sureties. If a surety dies without leaving any property available for the satisfaction of the recognisance the Court will direct a new surety to be appointed; but the rule is otherwise where he leaves real property bound by his recognisance.[2] The condition of the bond is that if the receiver shall from time to time and at all times so long as he shall continue as receiver duly and faithfully in all respects discharge the duties and obligations which devolve upon him and duly pass his accounts, then the bond shall be paid, but otherwise it will remain in full force.[3]

If the receiver faithfully discharges his duties and passes his account and pays the balance due by him, the surety is discharged, and he is at liberty to apply to have the recognisance vacated as to him. Should this be not so, an action must be brought on his bond against the surety who is answerable to the extent of the amount of the recognisance for whatever sum of money, whether principal, interest or costs, the receiver has become liable for, including the costs of his removal and of the appointment of a new receiver in his place. In ascertaining the liability of the surety the Court proceeds upon the principle that the surety is liable (to the extent of the amount of the penalty) for all sums of money which the receiver himself was properly liable to pay into Court or account for.[4]

[1] *Swain* v. *Smith*, Set. on Decr., 680.
[2] Kerr, v. *ante*, 241, 242.
[3] v. *Appendix*.
[4] Kerr, 242—244.

A surety who has been compelled to pay money on account of his obligation is entitled to be reimbursed out of the balance in the receiver's hands, Lord Eldon saying: "As the receiver is an officer of the Court, and the surety is so in a sense, if there is anything due on account between them, justice requires that, upon the application of the surety, he shall be indemnified for what he has paid for the receiver out of the balance due him."[1] And a surety who pays the debt of his principal has the same right against his co-surety that he has against the principal and will be permitted to put the bond in suit as against the co-surety.[2]

[1] *Glossup* v. *Harrison*, 3 V. & B., 134.

[2] *Re Swan's Estate*, Ir. R., 4 Eq., 209, cited in Kerr, 245.

APPENDIX

A.

ACT VIII OF 1859.

CIVIL PROCEDURE.

§ 92. IN any suit in which it shall be shown to the satisfaction of the Court that any property which is in dispute in the suit is in danger of being wasted, damaged, or alienated by any party to the suit, it shall be lawful for the Court to issue an injunction to such party, commanding him to refrain from doing the particular act complained of, or to give such other orders for the purpose of staying and preventing him from wasting, damaging, or alienating the property, as to the Court may seem meet. And in all cases in which it may appear to the Court to be necessary for the preservation or the better management or custody of any property which is in dispute in a suit, it shall be lawful for the Court to appoint a receiver or manager of such property, and, if need be, to remove the person in whose possession or custody the property may be from the possession or custody thereof, and to commit the same to the custody of such receiver or manager, and to grant to such receiver or manager all such powers for the management or the preservation and improvement of the property and the collection of the

Cases in which an injunction to stay, waste, &c., may be granted.

Or in which a receiver or manager may be appointed.

rents and profits thereof, and the application and disposal of such rents and profits as to the Court may seem proper.

When the Collector may be appointed receiver or manager.

If the property be land paying revenue to Government, and it is considered that the interests of those concerned will be promoted by the management of the Collector, the Court may appoint the Collector to be receiver and manager of such land, unless the Government shall by any general order prohibit the appointment of Collectors for such purpose, or shall in any particular case prohibit the appointment of the Collector to be such receiver.

Appeal.

§ 94. Any order made under either of the last two preceding sections shall be open to appeal by the defendant.

When the property attached consist of debts or immoveable property, a manager may be appointed.

§ 243. When the property attached shall consist of debts due to the party who may be answerable for the amount of the decree, or of any lands, houses or other immoveable property, it shall be competent to the Court to appoint a manager of the said property, with power to sue for the debts, and to collect the rents or other receipts and profits of the land or other immoveable property, and to execute such deeds or instruments in writing as may be necessary for the purpose, and to pay and apply such rents, profits, or receipts towards the payment of the amount of the decree and costs; or when the property attached shall consist of land, if the judgment-debtor can satisfy the Court that there is reasonable ground to believe that the amount of the judgment may be raised by the mortgage of the land, or by letting it on lease, or by disposing by private sale of a portion of the land or of any other property belonging to the judgment-debtor, it shall be competent to the Court, on the application of the judgment-debtor, to postpone the sale for such period as it may think proper to enable the judgment-debtor to raise the amount.

Court may postpone sale of land if satisfied that amount of judgment may be raised by mortgage, &c.

In any case in which a manager shall be appointed under this section, such manager shall be bound to render due and proper accounts of his receipts and disbursements from time to time as the Court may direct. Manager to render accounts.

ACT I OF 1877.

SPECIFIC RELIEF.

WHEREAS it is expedient to define and amend the law relating to certain kinds of specific relief obtainable in civil suit. It is hereby enacted as follows :— Preamble.

§ 1. This Act may be called "The Specific Relief Act, 1877 :" Short title.

It extends to the whole of British India, except the Scheduled Districts as defined in Act No. XIV of 1874. Local extent.

And it shall come into force on the first day of May, 1877. Commencement.

§ 2. On and from that day the Acts specified in the schedule hereto annexed shall be repealed to the extent mentioned in its third column. Repeal of enactments.

§ 3. In this Act, unless there be something repugnant in the subject or context, Interpretation clause.

"Obligation" includes every duty enforceable by law : "Obligation."

"trust" includes every species of express, implied, or constructive fiduciary ownership : "Trust."

"trustee" includes every person holding, expressly, by implication, or constructively, a fiduciary character : "Trustee."

§ 4. Except where it is herein otherwise expressly enacted, nothing in this Act shall be deemed :— Savings.

(*a*) to give any right to relief in respect of any agreement which is not a contract ;

(*b*) to deprive any person of any right to relief, other than specific performance, which he may have under any contract ;

or

(*c*) to affect the operation of the Indian Registration Act or documents.

Specific relief how given.

§ 5. Specific relief is given—

(*a*) by taking possession of certain property and delivering it to a claimant ;

(*b*) by ordering a party to do the very act which he is under an obligation to do ;

(*c*) by preventing a party from doing that which he is under an obligation not to do ;

(*d*) by determining and declaring the rights of parties otherwise than by an award of compensation ;

or

(*e*) by appointing a Receiver.

Preventive relief.

§ 6. Specific relief granted under clause (*c*) of section (5) is called preventive relief.

Relief not granted to enforce penal law.

§ 7. Specific relief cannot be granted for the mere purpose of enforcing a penal law.

* * * * * *

Appointment of receivers discretionary.

§ 44. The appointment of a receiver pending a suit is a matter resting in the discretion of the Court.

Reference to Code of Civil Procedure.

The mode and effect of his appointment and his rights, powers, duties and liabilities are regulated by the Code of Civil Procedure.

ACT X OF 1877.

(CIVIL PROCEDURE.)

§ 503. WHENEVER it appears to the Court to be necessary for the realization, preservation or better custody or management of any property, moveable or immoveable, the subject of a suit, or under attachment, the Court may by order— Power of Court to appoint receivers.

(*a*) appoint a receiver of such property, and, if need be,

(*b*) remove the person in whose possession or custody the property may be from the possession or custody thereof;

(*c*) commit the same to the custody or management of such receiver; and

(*d*) grant to such receiver such fee or commission on the rents and profits of the property by way of remuneration, and all such powers as to bringing and defending suits, and, for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of instruments in writing, as the owner himself has, or such of those powers as the Court thinks fit.

Every receiver so appointed shall Receiver's liabilities.

(*e*) give such security (if any) as the Court thinks fit duly to account for what he shall receive in respect of the property;

(*f*) pass his accounts at such periods and in such form as the Court directs;

(*g*) pay the balance due from him thereon as the Court directs, and

(*h*) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

Nothing in this section authorizes the Court to remove from the possession or custody of property under attachment any person whom the parties to the suit, or some or one of them, have or has not a present right so to remove.

When Collector may be appointed receiver.

§ 504. If the property be land paying revenue to Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may appoint the Collector, to be receiver of such property.

Courts empowered under this chapter.

§ 505. The powers conferred by this chapter shall be exercised only by High Courts and District Courts. Provided that whenever the Judge of a Court subordinate to a District Court considers it expedient that a receiver should be appointed in any suit before him, he shall nominate such person as he considers fit for such appointment, and submit such person's name with the grounds for the nomination, to the District Court, and the District Court shall authorize such Judge to appoint the person so nominated or pass such other order as it thinks fit.

ACT XIV OF 1882.

CIVIL PROCEDURE.

Power of Court to appoint receivers.

§ 503. WHENEVER it appears to the Court to be necessary for the realization, preservation or better custody or management of any property, moveable or immoveable,

the subject of a suit, or under attachment, the Court may by order—

(*a*) appoint a receiver of such property, and, if need be,

(*b*) remove the person in whose possession or custody the property may be from the possession or custody thereof ;

(*c*) commit the same to the custody or management of such receiver ; and

(*d*) grant to such receiver such fee or commission on the rents and profits of the property by way of remuneration, and all such powers as to bringing and defending suits, and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits and the execution of instruments in writing as the owner himself has or such of those powers as the Court thinks fit.

Every receiver so appointed shall— Receiver's liabilities.

(*e*) give such security (if any) as the Court thinks fit duly to account for what he shall receive in respect of the property ;

(*f*) pass his accounts at such periods and in such form as the Court directs ;

(*g*) pay the balance due from him thereon as the Court directs ; and

(*h*) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

Nothing in this section authorises the Court to remove from the possession or custody of property under

attachment any person whom the parties to the suit, or some or one of them, have or has not a present right so to remove.

When Collector may be appointed receiver.

§ 504. Where the property is land paying revenue to Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may appoint the Collector to be receiver of such property.

Courts empowered under this chapter.

§ 505. The powers conferred by this chapter shall be exercised only by High Courts and District Courts :

Provided that whenever the Judge of a Court subordinate to a District Court considers it expedient that a receiver should be appointed in any suit before him, he shall nominate such person as he considers fit for such appointment, submit such person's name, with the grounds for the nomination, to the District Court, and the District Court shall authorize such Judge to appoint the person so nominated, or pass such other order as it thinks fit.

ACT VII OF 1888.

(AMENDING ACT XIV OF 1882.)

Amendment of section 503.

§ 42. IN section 503, clause (*d*), the words "as the Court thinks fit" shall be inserted after the words "by way of remuneration."

Amendment of section 504.

§ 43. In section 504, for the words "the Court may appoint the Collector" the words "the Court may, with the consent of the Collector, appoint him" shall be substituted.

RULES.

ORIGINAL SIDE, CALCUTTA HIGH COURT.

In reporting as to the fitness of receivers, &c., it should be stated what commission is proper to be allowed.

R. 19. IN all cases in which it shall be referred to the Master to enquire and report who is a fit and proper, person to be the receiver of any estate and property, or guardian of the property of any infant, or manager of any estate or property, for the purpose of giving effect to any charitable bequest, the Master shall also inquire and report what will be a proper commission or salary to be allowed. And whenever, for want of any other proper person who is willing to undertake any such duty, it shall become necessary to name the officer of the Court who shall have been nominated by the Court to be receiver of estates, the said officer shall pass his accounts half-yearly before the Master in such manner as any other receiver, manager, or guardian ought to do, once in the year; and in like manner as other receivers are required to do upon passing their accounts, he shall pay all monies into the hands of the Accountant-General and Sub-Treasurer of the Company, with the privity of the Accountant-General of the Court; and the Master in Equity is required to report any default of the officer in these respects, in like manner as by the 197th rule (*i.e.*, *Rule* 21, *post*) he is required to report the default of other receivers.

Court receiver to account half-yearly.

And pay balances into Court.

Master to report default.

Order appointing receiver to contain power to set and let.

R. 20. In every order directing the appointment of a receiver of a landed estate [except in cases where the officer of the Court is appointed receiver], there shall be inserted a direction, that such receiver may set and let, with the approbation of the Master, and not otherwise·

And in acting under such an order, it shall not be necessary that a petition be presented to the Court in the first instance, but the Master without special order, shall receive any proposal for the setting or letting of the estate from the parties interested, and shall make his report thereon; which report shall be submitted to the Court for confirmation, in the same manner as is now done with respect to reports in such matter made upon special reference; and until such report be confirmed, it shall not give any authority to the receiver.

Master to report on proposal to let.

Receivers, &c., to pass their accounts.

R. 21. All receivers of estates, except in cases where the officer of the Court is appointed receiver, as mentioned in the 193rd rule (*i.e.*, *Rule* 19, *supra*), and committees of the estates of idiots, lunatics, and managers of any estate or property for the purpose of giving effect to any charitable bequest, shall pass their accounts upon oath before the Master once in every year, but the Master shall be at liberty, upon the appointment of any such receiver, committee, or manager, at any time subsequent thereto, in the place of annual periods for the passing of such accounts, to fix either longer or shorter periods at his discretion. And the Master shall, upon the passing of such accounts, fix the days on which such receiver committee, and manager shall pay the balances appearing due on their accounts into Court. And with respect to such receivers, committees, or managers, as shall neglect to pass their accounts or to pay the balances thereof at the ordinary annual periods, or at such other period as shall be by virtue of this rule fixed for that purpose, the Master shall from time to time, when their subsequent accounts are produced to be examined and passed, not only disallow the commission or salaries therein claimed by such receivers, committees, or managers, but also charge interest at six per cent. per annum upon the

Oath once a year.

Or as may be directed.

And pay balances into Court.

Default.

balances so neglected to be paid by them during the time the same shall appear to have remained in their hands respectively. And the Master shall report on the first day of the second and fourth terms in each year whic of the said receivers, committees, and managers, respectively, have not duly passed their accounts, or paid in their balances.

R. 358. When a decree or order of this Court is attached in execution, a sale shall not be ordered, but a manager shall be appointed to realize the amount of the decree or order, subject to such terms as to security and otherwise as the Court or a Judge shall direct. Decree or order attached in execution.

APPENDIX

B.

FORMS.

1.

APPOINTMENT OF RECEIVER WITHOUT SECURITY OF ESTATE OF INTESTATE.

IT is ordered that A be and he is hereby appointed the Receiver (without security) of the moveable property and of the rents, issues and profits of the immoveable property belonging to the estate of B, the intestate in the pleadings in the suit named with power to get in and collect the outstanding debts and claims due to the estate of the said intestate and with all the powers provided for in section 503, clause (*d*), of the Civil Procedure Code, except that he shall not without the leave of the Court (1) grant leases for a term exceeding three years, or (2) bring suits in a District Judge's Court or a Subordinate Judge's Court except suits for rent, or (3) institute an appeal in any Court (except from a decree in a rent suit) where the value of appeal is over Rupees 1,000, or (4) expend on the repairs of any property in any period of two years more than half of the nett annual rental of the property to be repaired, such rental being calculated at the amount at which the property to be repaired would let

when in a fair state of repair. And it is further ordered that the defendants and all persons claiming under them do deliver up quiet possession of the said property, moveable and immoveable, of the said intestate together with all leases, agreements for lease, *kabooliats*, accounts, books, papers, memoranda and writings relating thereto to the said Receiver. And it is further ordered that the said Receiver do take possession of the said property, moveable and immoveable, and collect the rents, issues and profits of the immoveable property, and that the tenants and occupiers do attorn and pay their rents in arrear and growing rent to the said Receiver. And it is further ordered that the said Receiver shall have power to bring and defend suits in his own name and shall also have power to use the names of the plaintiffs and defendants who are to be indemnified out of the estate and effects of the said intestate, and it is further ordered that the receipt or receipts of the said Receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid to him as such Receiver as aforesaid.

Dated this day of 190 .

2.

APPOINTMENT OF RECEIVER SUBJECT TO SECURITY.

It is ordered, subject to security being given to the satisfaction of the Registrar of this Court, that A be appointed the Receiver of, etc. [*same as in last form*].

3.

APPOINTMENT OF COURT RECEIVER.

It is ordered, that the Receiver of this Court be and he is hereby appointed the Receiver of, etc. [*same as in last two forms*].

4.

APPOINTMENT OF PARTY TO BE RECEIVER.

It is ordered that upon the plaintiff (or the defendant) within from the furnishing security to the satisfaction of the Registrar of this Court he be appointed Receiver of the moveable and immoveable, &c., &c.

5.

APPOINTMENT OF RECEIVER OF A PARTNERSHIP BUSINESS.

It is ordered that the Receiver of this Court be and he is hereby appointed the Receiver to take charge of the partnership business lately carried on between the plaintiff and the defendant at the stock-in-trade thereof and to collect the outstandings of the said business with power to get in and collect the outstanding debts and claims due to the said business and with all powers provided for in section 503, clause (*d*), of the Civil Procedure Code. And it is further ordered that the said Receiver shall have power to bring and defend suits in his own name and shall also have power to use the names of the plaintiff and defendant who are to be indemnified out of the said partnership business. And it is further ordered that the parties to this suit do deliver and make over to the said Receiver all the stock-in-trade, books of accounts and all other books, documents, papers and property of the said partnership business in the possession of both or either of them. And it is further ordered that the receipt or receipts of the said Receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid or delivered to him as such Receiver as aforesaid. And it is further ordered that the said Receiver be allowed to charge to the estate in addition to his own establishment such further establishment as may be necessary.

6.

ORDER OF REFERENCE TO ENQUIRE WHO SHALL BE APPOINTED RECEIVER.

And it is further ordered that it be referred to the Registrar of this Court to enquire (*d*) Who will be a fit and proper person to be appointed Receiver of the said trust estate, such enquiry to be treated as an urgent reference.

7.

APPOINTMENT OF RECEIVER OF IMMOVEABLE PROPERTY.

It is ordered that the Receiver of this Court be and he is hereby appointed Receiver to collect the rents due and the growing rents of the premises belonging to the defendant with all powers provided for in sec. 503, clause (*d*) of the Civil Procedure Code, and it is further ordered that the said Receiver do collect the rents already grown due of the said premises until the further order of this Court, and that the tenant or occupier of the said premises do attorn and pay his rent in arrear and growing rents to the said Receiver. And it is further ordered that the said Receiver shall have power to bring and defend suits in his own name and shall also have power to use the name of the defendant who is to be indemnified out of the said property. And it is further ordered that the receipt or receipts of the said Receiver shall be a sufficient discharge for all sum or sums of money as shall be delivered to him as such Receiver as aforesaid. And it is further ordered that the said Receiver do out of the rents of the said premises so to be realised by him as aforesaid retain his commission and charges and out of the balance pay to the plaintiff his costs of and incidental to this application to be taxed by the taxing officer and do hold the residue subject to the further orders of this Court.

8.

POWER TO THE RECEIVER TO APPOINT MANAGER OF A BUSINESS AND AGENTS.

It is ordered that, pending the final determination of this suit or until the further order of this Court, A[1] be and he is hereby appointed the Receiver in his private capacity without security of the moveable property and the rents, issues and profits of the immoveable property belonging to the estate of B deceased in the pleadings in this suit named with power to get in and collect the outstanding debts and claims due to the estate of the said deceased and with all the powers provided for in section 503, clause (*d*) of the Civil Procedure Code, except [*same as form I*]. And it is further ordered that the plaintiff and the defendant and all persons claiming under them do deliver up quiet possession of the said property, moveable and immoveable, of the said deceased together with all leases, agreements for lease, *kabooliats*, accounts, books, papers, memoranda and writings relating thereto to the said Receiver. And it is further ordered that the plaintiff do forthwith make over all the books of accounts and other documents and papers relating to the said estate that are in Calcutta to the said Receiver. And it is further ordered that the said receiver do take possession of the said property, moveable and immoveable, and collect the outstandings, debts, dues and the rents, issues and profits of the immoveable property and that the tenants and occupiers do attorn and pay their rents in arrear and growing rents to the said receiver. And it is further ordered that the said Receiver shall have power to bring and defend suits in his own name. And it is further ordered that the receipt or receipts of the said Receiver shall be a sufficient discharge for all

[1] *I. E.* The Court Receiver.

such sum or sums of money or property as shall be paid to him as such Receiver as aforesaid. And it is further ordered that the said Receiver be at liberty to appoint a manager or managers for the business belonging to the said estate until the final determination of this suit or until the further order of this Court. And it is further ordered that the said Receiver be paid as his remuneration, a sum equal to one per cent. on the value of the estate coming into his hands, provided that such remuneration shall not be less than rupees . And it is further ordered that the said Receiver be at liberty to charge to the said estate the cost of such personal establishment as he may consider necessary and that he be at liberty to appoint such person or persons as his agent or agents at Rangoon, Mandalay and Churu as he may consider necessary and proper for the efficient management of the said estate.

9.

CONTINUING RECEIVER PENDING APPEAL.

It is ordered that upon the defendant furnishing security to the satisfaction of the Registrar of this Court for any damage which may accrue to the estate of A, deceased, the testator in the pleadings in this suit named by reason of the stay hereinafter directed, the said order, dated the in so far as it directs the stay of issue of the probate of the will of the said deceased, and the discharge of the Receiver appointed in this suit for a period of fourteen days be varied and that in lieu thereof it be ordered that the issue of the said probate to the plaintiff and the discharge of the said Receiver be stayed until the disposal of the appeal preferred by the defendant against the said decree and that the said order so varied do stand and that the said Receiver be continued until the disposal of the said

appeal with liberty to the plaintiff to apply to this Court in its original jurisdiction for an order for payment to him by the said Receiver out of the estate of the said deceased of such sum as that Court may deem reasonable in respect of the costs he has already incurred in this suit as also in respect of the costs which may be incurred by him in the said appeal and upon such terms as to security or otherwise as it may think proper and also with liberty to him to apply to such Court that the said Receiver be at liberty to carry on the said testator's business and to apply to this Court if the said appeal be not duly expedited by the defendant (appellant) and also for advancing the hearing of the said appeal when the same shall be ready for hearing. And it is further ordered that the costs occasioned by this appeal be costs in the said appeal preferred by the defendant against the said decree.

10.

RECEIVER APPOINTED TO SUE.

It is ordered that A B be at liberty to pay into Court to the credit of this suit the amount of the debt due by him to the defendant in this suit and which has been attached in execution of the decree in this suit.

And it is further ordered that C D (subject to his giving security to the satisfaction of the Registrar of this Court) be and he is hereby appointed Receiver to realize the said debt with power to sue in his own name and all other necessary powers under the provisions of section 503 of the Code of Civil Procedure. And it is further ordered that if the said debt be not paid into Court within one week from the service of this order on the said A B, the said Receiver be at liberty to take such steps as may be necessary to realize the amount of the said debt. And it is further ordered that the money so

to be realized by the said Receiver be paid into Court to the credit of this suit.

11.

ANOTHER FORM.

It is ordered that the Receiver of this Court be and he is hereby appointed Receiver to realize the decree in suit No. 23 of 1889 (wherein N D A is plaintiff and K B D is defendant) all filed in execution of the decree made in this suit with all powers provided for in section 503, clause (*d*) of the Civil Procedure Code. And it is further ordered that the said Receiver do hold such sale-proceeds subject to the further order of this Court. And it is further ordered that the receipt or receipts of the said Receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid or delivered to him as such Receiver as aforesaid.

12.

DISCHARGE OF RECEIVER.

It is ordered that C C M the Receiver appointed in this suit, do after retaining in his hands a sum sufficient to provide for payment of what shall be due to him and for payment of what he may be personally liable for as such Receiver and for the payment of costs hereinafter directed to be taxed pay the balance if any that shall be in his hands and deliver the moveable properties belonging to the estate of P S deceased in the pleadings in the suit named together with all documents relating to the said estate to the plaintiff and do retain his own costs and pay to the attorneys of the parties their respective costs of and incidental to this application including the costs of speaking to the minutes of this order, such costs to be taxed by the Taxing Officer of this Court. The costs of the

said Receiver being taxed as between attorneys and client, and that thereupon he be discharged and that he do pass his final accounts before this Court and pay the money that shall be found due from him on the passing of such accounts to the plaintiff and that thereupon the recognizance entered into by the said Receiver and his sureties be vacated. And it is further ordered that the plaintiff do continue to pay to the defendant S S C D monthly and every month the sum of Rupees for her maintenance as directed by the decree of this Court made in this suit and dated the day of one thousand eight hundred and eighty-four and that in default of payment of any two instalments of such monthly payments payable to the said defendant S S C D she be at liberty to apply to this Court for the appointment of a Receiver of the properties belonging to the said estate and charged with the payment of such maintenance.

13.

DISCHARGE OF RECEIVER. APPOINTMENT OF NEW RECEIVER.

It is ordered that A, the Receiver appointed in this suit of the estate of B, deceased in the pleadings in this suit named be and he is hereby discharged from further acting as such Receiver and that he do pass his final accounts before this Court. And it is further ordered that the Receiver of this Court be and he is hereby appointed the Receiver of the moveable property and the rents, issues and profits of the immoveable property belonging to the estate of the said B deceased in the pleadings in the suit named (hereinafter referred to as the said new Receiver) with power to get in and collect the outstanding debts and claims due to the estate and with all the powers provided

for in section 503, clause (*d*) of the Civil Procedure Code except that [*same as form I*]. And it is further ordered that the said *A* and all persons claiming under him do deliver up immediate possession of the said property, moveable and immoveable, belonging to the said estate together with all leases, agreements for lease, title-deeds, *kabooliats*, accounts, books, papers, letterpress copy book, letter file book, memoranda and writings of all kinds and description relating thereto to the said new Receiver. And it is further ordered that the said new Receiver do take immediate possession of the said property, moveable and immoveable, and collect the rents, issues and profits of the immoveable property, and that the tenants and occupiers do attorn and pay their rents in arrear and growing rents to the said new Receiver. And it is further ordered that the said new Receiver shall have power to bring and defend suits in his own name and shall also have power to use the names of the plaintiffs and defendants who are to be indemnified out of the said estate. And it is further ordered that the receipt or receipts of the said new Receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid to him as such Receiver as aforesaid. [And it is further ordered that the said new Receiver be at liberty to charge Government Commission on the income of the estate after deducting the amount payable for Government Revenue and other public demands at a rate not exceeding two and a half per cent. And it is further ordered that the said new Receiver be at liberty to charge such sum to the estate for his private remuneration and extra establishment as will not exceed the monthly sum of Rupees nine hundred and fifty heretofore paid to the Receiver for his remuneration and the maintenance of his Sudder establishment exclusive of the Kidderpore and Moffusil establishments but inclusive of Government Com-

mission as aforesaid.[1]] And it is further ordered that the said new Receiver be at liberty from time to time and without the further order of this Court to let out the said estate in *izara*—either in whole or in part in his discretion for a term not exceeding six years in such manner, upon such terms and upon such security as to the said new Receiver may seem proper and reasonable. And it is further ordered that the said new Receiver do out of the said estate pay the costs of all the parties of and incidental to this application to be taxed by the Taxing Officer of this Court to the respective attorneys and debit such payments to the respective shares of the said parties in the said estate.

14.

DISCHARGE OF RECEIVER. APPOINTMENT OF NEW RECEIVER WITH POWER TO CARRY ON BUSINESS.

And it is further ordered that the said Receiver be and he is hereby discharged from further acting as the Receiver of the said estate and that he do within one month

[1] The Court has, in two cases this year, had to consider the portion of this order in brackets, which was of an unusual character, and has held that the Court Receiver is not at liberty to accept a receivership as Court Receiver on a lower remuneration than the usual 5 per cent., and that this remuneration is intended to cover his own expenses and cost of establishment; and that if any extra establishment is considered necessary a case must be made out and a special order obtained. In *Malihur Rohoman* v. *Masihur Rohoman* (Suit 238 of 1903 Cal. H. C. Order 18th May 1903). Henderson, J., made an order which was drawn up in due course and was filed on the 15th June, and the Court Receiver took possession. Subsequently when application was made to Sale, J., in *Hafiz Nazir Ali* v. *Elahie Jan Begum* (Suit No. 746 of 1901) on the 27th June the question came up, and the Judge was informed of the terms of the order in the Ghosal suit (Form 13 *supra*) and the order made by Henderson, J. The two Judges then considered the whole question with the result that on the 1st July Henderson, J., recalled the order of the 18th May so far as it allowed a reduced Government Commission and private renumeration and directed that the order be drawn up in the usual form allowing 5 % to the Court Receiver and no more. Sale, J., later, on 15th July 1903, made an order in the second suit in the same terms.

from the date hereof pass his final accounts before one of the Judges of this Court and pay the balance that may be found due on the passing of the said account to the Receiver hereinafter appointed. And it is further ordered that A be and he is hereby appointed the Receiver without security of the moveable property including the business carried on at in the town of Calcutta (hereinafter referred to as the said moveable property) and of the rents, issues and profits of the immoveable property belonging to the said estate with power to get in and collect the outstanding debts and claims due to the said estate and with all the power provided for in section 503, clause (*d*), of the Civil Procedure Code except that [*same as form I*]. And it is further ordered with the consent of all the parties by their respective attorneys that the said Receiver do carry on the said business and that he be allowed to charge to the said estate such establishment as may be necessary and that he be allowed a remuneration of Rupees a month with liberty to apply for enhanced remuneration when and if the state of the said business shall admit of it and let the consideration of the question of the costs of and incidental to this application and of the reference directed by the said order be reserved until the further order of this Court and the parties are to be at liberty to apply to this Court in respect of the payments of the amounts mentioned in the said report or as they may be advised.

15.

DISCHARGE : APPOINTMENT OF NEW RECEIVER OF ATTACHED PROPERTY.

It is ordered that the said J K, the Receiver appointed in this suit, be and he is hereby discharged from further acting as such receiver as aforesaid. And it is further

ordered that subject to security being given to the satisfaction of the Registrar of this Court, D C of in Calcutta aforesaid, merchant and a member of the firm of H D D C, be appointed the Receiver in the place and stead of the said J K to realize the sum of Rupees from K S, being the amount of the debt due by him to the defendant in this suit and attached in his hands under the said prohibitory order with power to the said Receiver for the purpose of realizing such debt to continue the suit No. of One thousand eight hundred and (wherein J K, residing in the Town of Calcutta, Merchant and Commission Agent, is plaintiff, and V L S, residing at in the Town of Calcutta, Broker and Trader, is defendant) in his own name and with all other necessary powers provided for in section 503 of the Code of Civil Procedure. And it is further ordered that the receipt of the said receiver shall be a sufficient discharge for all sum or sums of money as shall be paid to him as such receiver as aforesaid. And it is further ordered that the money so to be realized by the said receiver as aforesaid be paid by him to the Comptroller-General of Accounts for the time being of the Government of India and the Secretary and Treasurer for the time being of the Bank of Bengal with the privity of the Accountant-General of this Court to be by them placed to the credit of this suit subject to the further order of this Court. And it is further ordered that the costs of and incidental to this application be costs in the execution proceedings in this suit.

16.

RECEIVERS AND SURETIES BOND.

Know all men by these presents that we, A B and C D
are held and firmly bound unto R H C ,

his successors and assigns in the sum of Rupees for which payment to be well and truly made we bind ourselves and each of us and each of our heirs, executors and administrators firmly by these presents sealed with our respective seals dated this day of One thousand nine hundred and

Whereas by an order of the said High Court dated the day of One thousand nine hundred and and made in suit No. of wherein X is plaintiff and Y and Z are defendants. It was (amongst other things) ordered that subject to security being given to the satisfaction of the said Registrar of the said Court the said A B should be appointed the Receiver in the said suit of the moveable property and of the rents, issues and profits of the immoveable property (other than the family dwelling house) belonging to the estate of in the pleadings in the said suit named with the powers and authorities therein particularly mentioned, and whereas the said A B has proposed the said C D as his surety and the said Registrar has accepted the proposal and the said A B and C D have agreed to enter into the above bond with such condition as is hereinunder written.

Now the condition of the above written bond or obligation is such that if the said A B shall, from time to time and at all times hereafter so long as he shall continue as such Receiver, duly and faithfully in all respects discharge the duties and obligations which shall devolve upon him as such Receiver and pass his accounts at the times and in manner by law or the rules of the Court or by any order of Court in that behalf provided, then the above written bond or obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Signed, sealed and delivered }
at in the presence of }

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